In The

Supreme Court of the United States

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC. AND JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL,
Petitioners,

v.

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO AND FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED AND DAVID C. MURRAY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Wilmorite, Inc., Fayetteville Plaza, Inc., and James P. Wilmot, d/b/a Fayetteville Mall (hereinafter "Petitioners"), petition for a writ of certiorari to review the judgment and

decree of the United States Court of Appeals for the Second Circuit entered in this action.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported at 578 F.2d 1372 (June 30, 1978). The judgment and decree of the court is reproduced and annexed to this petition as Appendix A. The court did not publish a written opinion, but adopted the opinion of the District Court. The opinion of the United States District Court for the Northern District of New York (Appendix B) is not reported. References to these opinions below will be made by Appendix page number.

JURISDICTION

The judgment and decree of the Court of Appeals (A-1) was made and entered on June 30, 1978. No petition for rehearing or rehearing *en banc* was filed. This Court has jurisdiction under 28 U.S.C. §1254(1). Subsequent to the filing of this action, stipulations and orders of discontinuance were entered in favor of respondents Pyramid Brokerage Company, Inc., and David C. Murray.

QUESTIONS PRESENTED

Relying upon this Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (hereinafter, *"Noerr"*), the Court of Appeals held that petitioners' complaint and proposed amended complaint failed to state a claim upon which relief could be granted because "defendants' conduct, under the facts and theory therein alleged, was immune from liability under antitrust laws." (A-1.)

The questions presented by this action are:

1. Whether the *Noerr-Pennington*[1] exemption applies to concerted activity among horizontal business competitors to instigate for private anti-competitive gain multiple repetitive zoning lawsuits in the names and interests of legitimate homeowners, without themselves petitioning and having no cognizable grievance to redress.

2. Whether the *Noerr-Pennington* Doctrine immunizes a conspiracy among horizontal business competitors to delay and prevent final adjudication of multiple repetitive lawsuits for the purpose of utilizing their mere pendency to prevent a competitor from obtaining the financing and tenant commitments necessary to enter the market.

3. Whether the *Noerr-Pennington* Doctrine immunizes a sham publicity campaign instigated after a zoning controversy is in the courts, and undertaken not for the purpose of influencing the courts or governmental agencies, but rather for the sole purpose of interfering directly with the business relationships of competitors.

4. Although it is not the primary focus of this request, petitioners wish to raise their objection to the summary treatment below of their complex antitrust claims, and the

[1] *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

absolute denial of leave to replead, as conflicting with the principles enunciated by this Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), should the writ be granted.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the scope of federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§1, 2, and Section 4 of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §15, in the light of the First Amendment of the United States Constitution. These constitutional and statutory provisions are set forth in Appendix C to this Petition.

STATEMENT OF THE CASE

This action was filed by petitioners on February 8, 1977, as *Wilmorite, Inc., et al. v. Eagan Real Estate, Inc., et al.*, Civil Action No. 77-CV-47 (N.D.N.Y.), alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, based upon respondents conspiracy to monopolize and unreasonably restrain trade in the development and operation of commercial real estate in general, and regional shopping centers in particular, in and around Syracuse, Onondaga County, New York. The complaint seeks compensatory damages of $72 million after trebling, together with cost of suit including reasonable attorneys' fees. Federal question jurisdiction was invoked pursuant to 28 U.S.C. §1391.

This petition arises from summary judgment granted upon respondents' motions to dismiss the complaint of petitioners and from denial of petitioners' motion to amend the judgment to permit leave to file a proposed amended complaint, all as affirmed and adopted by the Court of Appeals. The basis for the District Court's disposition was its conclusion that the complaint

and proposed amended complaint failed to state a claim by virtue of the *Noerr-Pennington* Doctrine.

A. *The Pleadings*

Because the proceedings in the District Court consisted of respondents' motions to dismiss the complaint (although some matters outside the pleading were considered by the Court) and petitioners' application for leave to file an amended complaint (in the nature of a motion for leave to replead), the allegations of petitioners' pleadings are entitled to be accepted as established. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16 (1972). Therefore, for purposes of this Petition, the allegations of those pleadings will be treated as if established.

Regional shopping centers are those of sufficient size and variety to provide in a single location retail stores that can satisfy the shopping needs of substantial numbers of consumers from a large geographic area. They are readily distinguishable from smaller residential or neighborhood shopping centers, which provide fewer stores and are "anchored" by food or drug, rather than major department, stores.

Petitioners are engaged in the development and operation of regional shopping centers in Onondaga County, New York. Most of the respondents are likewise engaged in commercial real estate development in Onondaga County and the principal group of respondents, the Eagans, are the largest commercial real estate and regional shopping center investors and developers in Onondaga County.

The development of a regional shopping center is a massive yet delicate effort to coordinate the timing of all prerequisites to construction. Particularly vital is the attraction of major anchor tenants, who typically will not commit to join a proposed development until construction is ready to commence. Tenant stores will not sign irrevocable lease commitments while the

zoning of a project is in litigation. Prolonged zoning litigation forces prospective tenants to join other developments, since their construction plans and budget are pre-determined in accordance with regional economic conditions and national corporate policy. Without tenant commitments, banks will not finance construction.

In essence, petitioners charge that the respondents, in shifting groups but always led by the Eagans, combined and conspired to exclude the developments of petitioners and others for the purpose of preventing competition with their own shopping centers. The continuous obstruction engendered by this conspiracy spanned at least 1965 through the time of the complaint (1977) and was instigated, directed, and financed by respondents and their accomplices. The conspirators incited and financed — but typically avoided commencing in their own names or right — repetitive lawsuits and other proceedings to prevent or impede zoning necessary for construction of competing centers. Each such proceeding was instituted regardless of merit and for the primary purpose of delay and direct interference with petitioners' ability to obtain financing and anchoring tenants for the centers. The proceedings were eventually resolved against the respondents, but after substantial and ruinous delay to petitioners and others.

Fayetteville Mall

In 1965 petitioners decided to build a regional shopping center named Fayetteville Mall in the Town of Manlius. The petitioners sought a change in zoning to accommodate the proposed development, and in January 1967 the Town Board amended its zoning ordinance to permit the proposed mall.

Approximately two miles from the proposed site was a regional shopping center named Shoppingtown, owned and operated by the Eagans. One of the principal department stores of Shoppingtown is operated by respondent Dey Brothers and

Co., Inc. ("Dey Brothers"), a subsidiary of respondent Allied Stores Corporation ("Allied"). Fayetteville Mall, as then proposed, would compete directly with Shoppingtown for tenants and customers.

In an attempt to exclude or delay any competition from Fayetteville Mall, the Eagans, Allied, Dey Brothers, and others secretly conspired to obstruct the rezoning of the site from June 1965, when the first zoning petition was presented to the Town, until 1971, when the site rezoning was finally upheld. Respondents accomplished their objective by covertly instigating and organizing opposition from local merchants and local homeowners, by retaining and paying witnesses and lawyers to appear ostensibly on behalf of local homeowners at public hearings, by instigating, organizing, and financing litigation by local residents, and by manfacturing adverse publicity solely to discourage tenant stores from signing up for the new mall.

In March 1967, after the rezoning was approved by the Town, an action was commenced in the names of 148 area residential property owners in New York State Supreme Court, entitled *Albright, et al. v. Town of Manlius, et al.*, for a judgment declaring the rezoning invalid and void. The stated basis for the relief sought was the purported standing of the homeowners to prevent unwarranted destruction of their property values. In reality, however, the lawsuit was covertly conceived and brought by the Eagans, Allied, Dey Brothers, and other conspirators for the secret purpose of forestalling the rezoning, thus killing the development of Fayetteville Mall. In July 1967, another ostensibly independent action in the name of an area resident was commenced in New York State Supreme Court, entitled *Schaff v. Town of Manlius, et al.*, seeking similar relief. This second, substantially identical, lawsuit was also covertly instigated and organized by the Eagans, Allied, Dey Brothers and other horizontal shopping center developers in the area, in-

cluding respondent Earl Oot, again for the purpose of barring final resolution of the zoning issues obstructing the new mall.[2]

The *Albright* and *Schaff* actions were eventually consolidated at the request of petitioners herein, and both were ultimately dismissed by the New York Court of Appeals in 1971. *Albright v. Town of Manlius*, 28 N.Y.2d 108, 320 N.Y.S.2d 50 (1971).

The effect of respondents' conduct was to delay Fayetteville Mall for over 6 years, during which time enormous building costs increases were incurred, substantial profits lost, prospective anchor tenants permanently lost, and competition foreclosed. The result was to further strengthen the market dominance enjoyed by the Eagans and their affiliates and to restrict the public's economic freedom of choice, with consequent adverse effect on the quality and price of the products offered by respondents.

All of the above was set forth in the complaint and realleged in the proposed amended complaint. In addition, the latter pleading supplemented the allegations in the first complaint particularly as to respondents' intent, frequently in the conspirators' own words.

Annexed to the proposed amended complaint were transcripts of telephone conversations and memoranda of the named respondents and their accomplices, made by the conspirators themselves contemporaneously with the events described in the complaint. Although the issue was not raised by respondents until this action was on appeal, petitioners assured the Court of Appeals that the transcripts were not obtained illegally by

[2]The New York State Supreme Court originally declared the amendment void and invalid for lack of a comprehensive plan and for lack of adequate public notice to area homeowners concerning various conditions of use. The Appellate Division reversed on the comprehensive plan issue but affirmed on the lack of notice issue. *Albright v. Town of Manlius*, 34 A.D.2d 419, 312 N.Y.S.2d 13 (4th Dep't 1970). As stated in the text, the New York Court of Appeals dismissed the actions in their entirety.

petitioners and that, in any event, such disputes should be resolved at a more appropriate stage of this proceeding. The accuracy and authenticity of the transcripts have never been disputed by the parties having knowledge thereof.

These transcripts indicate that the Eagans and Allied worked "behind the scenes" to manufacture apparent opposition to the rezoning of the mall site and to misrepresent to the courts that the opposition was that of neighboring homeowners. As just one example, the Eagans secretly retained and agreed to pay respondent Arthur Reed to testify as an expert witness supposedly on behalf of the homeowners. Reed agreed to and did testify even though he had no knowledge regarding Fayetteville Mall or the proposed site. The trial court expressly relied on the credibility of the testimony of Reed and other Eagan conspirators in finding that the named petitioners had the requisite standing to bring the proceedings and that the proposed shopping center would injure their home values. Reed's status as a paid witness of the Eagans was never revealed to the litigants or the Court.

Another example of fraud on the courts was the instigation of the *Schaff* action, a lawsuit conceived and executed by the Eagans and their competitor, Earl Oot. In considering whether to have respondent Oot bring this second action in his own name, the Eagans secretly concluded that Oot's status as a competing developer would be "transparent" to the court. Hence, the Eagans and Oot conspired to give the action apparent legitimacy by finding another homeowner to lend her name to the suit.

The homeowners' actions were actually those of the Eagans. The relief purportedly sought therein was peripheral; delay was the central purpose. As respondent Edward Eagan, himself a lawyer, noted: "I'm talking time — how much time are we stalling." During 1966 through 1971, the Eagans, whose involvement was completely unknown to the courts, paid counsel over $100,000 to prolong these proceedings. In none of the

proceedings did respondents themselves ever petition the courts for a redress of grievances.

By reason of the anti-competitive combination of the Eagans and their accomplices, the validity of the rezoning was not confirmed until 1971, six years after petitioners herein petitioned for zoning relief. Fayetteville Mall was not completed until several years later and long after the Eagans' Shoppingtown had become entrenched as the market leader.

Great Northern Mall

In 1975, petitioner Wilmorite, Inc., developed plans to build another major regional shopping center in Onondaga County. Called "Great Northern Mall," this center was proposed for a 110-acres site in the northern part of the Town of Clay. In November of that year Wilmorite applied for the necessary zoning change. After public hearings in January 1976, the Town Board enacted the change requested.

Concurrently, the Eagans were developing Penn Can Mall in a nearby area. To insulate Penn Can Mall from competition, the Eagans and other area developers again conspired to delay or kill petitioners' development. On this occasion, respondent Kimbrook Realty fronted as "petitioner" in the multiple sham zoning litigation.

Kimbrook Realty owned a Planned Unit Development ("PUD") located in the Town of Clay several miles from the site of Great Northern Mall. The project is operated by a Kimbrook affiliate, respondent CFB Development, Inc. Kimbrook Realty, however, is controlled by respondent Kimbrook Corp., an Eagan corporation. Soon after the Town of Clay approved the rezoning for Great Northern Mall in March 1976, Kimbrook commenced two substantially identical actions in New York State Supreme Court attacking the Great Northern Mall rezoning. Both

proceedings were eventually dismissed with prejudice against Kimbrook.

Both lawsuits were ordered, directed, financed, and controlled by the Eagans and others in order to avoid or delay competition with Penn Can Mall. Respondents' conspiracy materially delayed, if not killed altogether, the development of Great Northern Mall, causing increased construction costs, lost profits and lost tenant opportunities. As a result, competition was eliminated and the number of retail outlets available to the public was restricted.

Pyramid Mall East

The original complaint also alleged that the Eagans and other respondents conspired to prevent or delay the development of projects by persons other than petitioners. This was not particularized in the original complaint. The proposed amended complaint, however amplified the initial pleading to set forth in detail how respondents implemented their conspiracy against shopping center developers other than petitioners, thereby further solidifying their monopolist position. One such regional development was Pyramid Mall East, which due to respondents' covert efforts in 1972 and 1973 was eventually reduced to a neighborhood center. Although the anti-Pyramid campaign occurred in the political arena, it employed clearly illegal *per se* violations of the antitrust laws, including an attempted boycott by large retail advertisers organized by the Eagans to pressure Syracuse newspapers into adversely reporting on the Pyramid proposal.

This continuing pattern of anti-competitive conduct, spanning at least 1965 to the present, thus stunted Fayetteville Mall, crippled Pyramid Mall, and excluded Great Northern Mall.

B. *The District Court Proceedings*

The Motions to Dismiss. All respondents moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim.[3] Accepting the complaint's material allegations as true, the court below nevertheless considered limited material outside the complaint and, accordingly, treated the motions as motions for summary judgment. (A-32.) The Court found respondents' conduct immune from antitrust prosecution by virtue of the *Noerr-Pennington* Doctrine. (A-12.) The motions were granted and judgment entered dismissing the complaint in all respects. The dismissal expressly denied leave to replead. (A-31.)

The Motion to Alter or Amend the Judgment. Petitioners subsequently moved for an order, pursuant to Fed.R.Civ.P. 59(e), altering and amending the judgment to permit filing of an amended complaint. A proposed amended complaint was annexed to the moving papers.

At the oral argument, petitioners' motion was denied, the District Court holding that the proposed amended complaint stated no facts not assumed to be true in the dismissal of the original complaint and that the conduct of respondents was immunized by *Noerr*.

C. *The Proceedings in the Court of Appeals*

Respondents appealed to the United States Court of Appeals for the Second Circuit both from the summary judgment dismissing the original complaint and from the order denying petitioners' motion to alter the judgment to permit an amended complaint pursuant to Rule 59(e). (In effect, this motion sought leave to replead as provided in Rule 15(a)). If the original

[3]Additionally, respondents Pyramid Brokerage, Kimbrook Realty, CFB Development, Inc., Camperlino and Fatti Builders, Inc., Frank Fatti, William J. Camperlino, and William Bargabos moved for summary judgment pursuant to Rule 56.

complaint were found sufficient, then the proposed amended complaint and the question of whether it should have been allowed need not have been reached.

The case was fully briefed and arguments were made to the Court of Appeals on June 14, 1978. Two weeks later, on June 30, the Court of Appeals affirmed, in a one-page decree (A-1), the judgment of the District Court on the original opinion below of District Judge Edmund Port. (A-3.) The Court of Appeals further held that "[t]here was no abuse of discretion by the District Court in denying leave to file an amended complaint because defendants' conduct, under the facts and theory therein alleged, was immune from liability under the antitrust laws." (A-1, A-2.) The Court of Appeals thereby adopted both the conclusion and reasoning of the District Court and the latter's opinion shall hereinafter be treated as the opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's Decision Misapplies *Noerr* and *California Motor Transport* and Directly Conflicts with this Court's Decision in *Otter Tail.*

The questions before this Court focus on the failure of the Court of Appeals to apply, or even reference, the heavy presumption in favor of antitrust enforcement, and against exemptions and immunities, repeatedly articulated by this Court. This error stems from the Court of Appeals' narrow construction of *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) (hereinafter, *"California Motor Transport"*), and the sweeping breadth it accords the *Noerr-Pennington* Doctrine. Moreover, on the facts of this case, its construction flies in the face of *United States v. Otter Tail Power Co.*, 360 F.Supp. 451 (D.Minn. 1973), *aff'd mem.* 417 U.S. 901 (1974), and disregards the sham exception set forth in *Noerr* itself. 365 U.S. at 144.

A. *Respondents Did Not Engage in First Amendment Activity.*

The Court of Appeals relies solely on the *Noerr* exception to the antitrust laws as a basis for dismissing petitioners' complaint and proposed amended complaint. That petitioners have otherwise stated a claim under the antitrust laws is not even contested: Respondents are horizontal business competitors and their agents, who combined to, and did, bar petitioners' and others' entry into the market. They did so repeatedly and successfully to the enormous injury of petitioners. Their activities substantially lessened competition and injured the public. Moreover, one group of respondents — the Eagans — enjoy a pervasive and notorious control over commercial real estate development in Onondaga County, New York. That this is an

appropriate case for antitrust scrutiny under Sections 1 and 2 of the Sherman Act is plain.

The court below begins its analysis with the First Amendment and whether failure to dismiss petitioners' complaint might somehow "chill" use of First Amendment rights. (A-13.) This Court has rejected such an analysis of antitrust exemptions.

In *City of Lafayette v. Louisiana Power & Light Co.*, 98 S.Ct. 1123 (1978) (hereinafter, *"City of Lafayette"*), this Court (in a portion of the plurality opinion of Mr. Justice Brennan concurred in by a majority of the Court) sets forth the proper mode for analysis of the related "immunities" of *Noerr-Pennington* and *Parker v. Brown*, 317 U.S. 341 (1943). Only where application of the antitrust laws would "severely impinge" upon the values reflected in the twin doctrines, is the presumption favoring antitrust enforcement overcome. Because the policies of the antitrust laws are "overarching and fundamental" and are designed to safeguard the economic liberties of the people, a heavy burden is placed upon those who would escape the strictures of antitrust by resort to an "immunity." The Court of Appeals did not hold respondents to this burden.

At the outset, the Court of Appeals disregards the legion of decisions deploring summary disposition of complex antitrust claims and, further, improperly resolves fact questions against petitioners. And it does so in the service of a vague, unspecific and, more importantly, *unproven* notion of a "chilling effect" that adjudication of petitioners' claims would supposedly cause.

In relying on "chilling effect," the court below does not take the necessary first step of analysis: For respondents did not engage in First Amendment petitioning and the right to petition is therefore not at stake. The means used by respondents to implement their anti-competitive conspiracy consisted not of petitioning, but of contriving a scheme for others (with ostensibly legitimate interests) to bring multiple repetitive lawsuits against petitioners. The proceedings were not brought in the

names of respondents and did not assert the genuine rights or interests of respondents.[4] Rather, they were conceived, instigated, financed, and directed by respondents covertly and for the purpose of deceiving and misleading the agencies of government as to the true parties and their real interests.

Thus, respondents expressly conspired to conceal from the tribunals their economic (and, indeed, anti-competitive) interests in the proceedings and to contrive a false appearance of independence and lack of connection, as illustrated by a conversation between respondent Leo T. Eagan and one of his attorneys:

> "[ATTORNEY JAMES WILBER:] Remember, we were trying to get as many in as possible. We now have the Oot office with a plaintiff. I've been working with them on their complaint too. We can expect that their lawsuit will be brought in the near future. *We hope that will gum things up a little bit more.*
>
> "[RESPONDENT EAGAN:] What is their lawsuit about?
>
> "[ATTORNEY WILBER:] They're going to take another party out there and bring a lawsuit similar to ours. The trouble we've used just about every neighbor around there, but we finally found one for them. Earl has an interest — Earl Oot in the Oot office, and he's also a lawyer in that office. He has an interest because he has a shopping area over in Freemont and he's affected. So we'll have his complete cooperation. We've been kind of leading him by the hand. The more we get at this clambake the better off we're going to be.
>
> "[RESPONDENT EAGAN:] *And the more they can show that there is no connection together the better off it is.*" (Emphasis supplied.)

A further portion of this same conversation demonstrates that respondents and their accomplices expressly conspired to mislead the courts as to their real interests:

[4]Except for Kimbrook Realty, the pleadings describe no proceeding in which any respondent appeared and identified himself or brought an action against petitioners.

> "[ATTORNEY WILBER:] We thought that maybe when these other lawsuits get started, that would be a good key for some more publicity — when we get these other plaintiffs in here.
>
> "[RESPONDENT EAGAN:] Oot's people?
>
> "[ATTORNEY WILBER:] Yes.
>
> . . . .
>
> "[RESPONDENT EAGAN:] Are Oot themselves going to bring it?
>
> "[ATTORNEY WILBER:] Yes.
>
> "[RESPONDENT EAGAN:] That's good. Here is a local, fine family — I'm trying to think of the story now. Here are brothers—
>
> "[ATTORNEY WILBER:] *No, they will not be the plaintiff. It would be rather transparent for them to do it.*
>
> "[RESPONDENT EAGAN:] So the plaintiff is going to be some neighbor. And Oot is going to be the lawyer?
>
> "[ATTORNEY WILBER:] He'll have Jack Setright probably try it.
>
> "[RESPONDENT EAGAN:] Right in his office?
>
> "[ATTORNEY WILBER:] Yes.
>
> "[RESPONDENT EAGAN:] So there is litigation on litigation." (Emphasis supplied.)

Far from petitioning the government for a redress of grievances, respondents deliberately and assiduously avoided petitioning the agencies and courts or informing them of their interests and participation. As it is not the exercise of First Amendment rights that petitioners attack, it is difficult to discern how, much less the extent to which, First Amendment rights are "chilled." By refusing to apply the "severe impingement" standard of *City of Lafayette, supra*, brought to the attention of the Court of Appeals in petitioners' reply brief below, the judgment in this action misapplies the decisions of this Court.

B. *The Predatory Methods Used by Respondents to Exclude Competitors from the Market Are Not Protected by the Right to Petition Adjudicatory Bodies.*

The *Noerr* doctrine ultimately rests upon the right to petition established by the First Amendment, 365 U.S. at 137-38. In *California Motor Transport*, the Supreme Court held that although the right to petition recognized in *Noerr* "extends to all departments of the Government," the exercise of that right must accord with the administrative and judicial setting in which the petitioning takes place. 404 U.S. at 510-16. Any inquiry as to the proper application of the *Noerr* defense must therefore begin with the question of whether the activities of the respondents constituted a proper exercise of the constitutional right to petition the particular governmental body involved. This inquiry may be framed in terms of the basic applicability of *Noerr* itself or in terms of whether the "sham exception" to *Noerr* controls. The outcome should be the same under either approach.

Courts perform a vastly different function in our system of government than do legislatures and political agencies. It is the essence of judicial proceedings to determine the personal rights of individuals appearing before the court, based upon the personal grievances of the parties. Courts ordinarily make determinations upon a formal petition and after a formal hearing. Such petitions must disclose the persons petitioning the tribunal and the grievances upon which the petitions are based.[5]

Moreover, adjudication is optimally unbiased and free of prejudice by unasserted or undisclosed private interests. Indeed,

[5]It is especially important to note that New York state law requires disclosure of a cognizable property interest in order to bring a zoning action. Effects on competition do not confer standing to attack zoning. *E.g.*, *Haber v. Board of Estimate*, 33 A.D.2d 571, 305 N.Y.S.2d 520 (2d Dep't 1969) (plaintiffs must allege specific pecuniary or property interest in zoning dispute).

courts of justice are not representative bodies in the political sense. To this end, *ex parte* approaches to a court are forbidden except under special circumstances. Even a formal approach by a non-party, such as by an *amicus curiae* brief, is not a matter of constitutional right but may be made only by leave of court. These requirements graphically illustrate the unique function of courts in our system of separated powers. Whereas a legislature is by its nature a representative body, courts are not established for the purpose of representing the wishes of any group but, rather, for adjudicating the personal grievances of identified parties appearing before them.

It follows that misrepresentation of standing and interests to the court is one of the most pernicious abuses of the judicial system. Such conduct is "access barring" at its worst, for it prevents the innocent victim from expeditiously exposing the frivolousness of the litigation to which it has been subjected.

The single most pervasive distinction between political activity and adjudication is the strict requirement of truthfulness and good faith imposed upon litigants and their lawyers. It is this fundamental requirement of ethical conduct in judicial proceedings that lies at the heart of *California Motor Transport*. There, this Court recognized that "the political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics," but that such conduct was nevertheless protected political activity under the First Amendment, 404 U.S. at 512. Of crucial significance, however, is that this Court in *California Motor Transport* applies a more stringent standard to the exercise of the right to petition administrative and judicial bodies:

> Yet unethical conduct in the setting of the adjudicatory process often results in sanctions .... There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations.

Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.

404 U.S. at 512-13 (emphasis supplied). Insofar as administrative or judicial processes are concerned, such unethical conduct does not constitute legitimate petitioning and cannot take refuge in the First Amendment.

Despite this paramount thesis of *California Motor Transport*, the Court of Appeals failed to recognize the fundamental distinction between political petitioning and judicial petitioning. Whatever immunity might have been accorded respondents had their tactics been employed in a purely political setting, such conduct cannot be tolerated in the courts. Certainly it cannot be viewed as conduct deserving of First Amendment protection.

The words of the respondents set forth in the proposed amended complaint conslusively demonstrate that the Eagans manipulated virtually every aspect of the adjudicatory process: the selection of the parties plaintiff; the selection of attorneys; and, most importantly, the conduct of the proceedings themselves. These were conducted primarily to delay a determination on the merits until petitioners' development was "squashed." Even the most minute details — trial preferences, discovery, witnesses, news coverage, security bond, timing of pleadings — were manipulated by and for the benefit of the Eagans. The record is replete with respondents' misrepresentations to the courts, usurped standing, and gross abuse of the judicial process.

Similarly, the Eagans and their accomplices conceived and suborned the repetitive Kimbrook lawsuits against Great Northern Mall, not for the avowed purpose of protecting Kimbrook's PUD, but rather to prevent competition to the Eagan's new Penn Can Mall. Key to the scheme, however, was again concealing the true party in interest from the courts.

Nor is it responsive to conclude, as did the District Court (A-27, A-28), that respondents' lawsuits were not "baseless" since some of them prevailed on some issues at lower court levels. The

crucial point missed by that analysis is that respondents would not have prevailed at *any* level on *any* issue had the courts been told that the zoning was being challenged by competitors rather than neighboring property owners. The facts pleaded demonstrate that under applicable New York law respondents' actions were utterly baseless and totally frivolous. They thus evidence a pattern of repetitive and baseless abuse of the courts not condoned by *Noerr's* extention to the judicial arena. The Court of Appeals, by adopting the opinion of the District Court, thus ignores the central teaching of *California Motor Transport*, and a writ of certiorari should therefore issue.

C. *The Decision of the Court of Appeals is in Direct Conflict with this Court's Decision in Otter Tail.*

In *Otter Tail Power Co. v. United States*, 417 U.S. 901 (1974), *aff'g mem.* 360 F.Supp. 451 (D.Minn. 1973), *on remand from* 410 U.S. 366 (1973) (hereinafter, "*Otter Tail*"), this Court found defendant private electrical company liable under the antitrust laws for its repetitive use of litigation "timed and designed principally to prevent the establishment of municipal electrical systems," thereby preserving defendant's monopoly. *See* F.Supp. at 451.

In its first *Otter Tail* opinion, this Court, quoting the trial court, identified the economic vice of such litigation, noting that the "pendency of litigation has the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal [electrical] system" and that "[m]ost of the litigation sponsored by the defendant was carried to the highest available appellate court" and, although unsuccessful on the merits, "had the effect of halting, or appreciably slowing, efforts for municipal ownership." 410 U.S. at 379.

In the instant case, petitioners pleaded the parallel devastating effects of the pendency of zoning litigation in blocking financing and tenant-acquisition for a proposed shoppping center. Indeed, the Eagans, enjoying a dominant market

position, prolonged such litigation to achieve these very objectives. The advantages achieved by delay displaced any genuine attempt to adjudicate the disputes. Such conduct effectively bars petitioners from access to usable zoning relief and interferes directly with vital business relationships. As such, it falls squarely within *Otter Tail* and ought not be condoned. The decision of the Court of Appeals directly conflicts with *Otter Tail* and should be reviewed by this Court.

D. *The Decision of the Court of Appeals Conflicts with the Example of Sham Given in* Noerr.

Even the *Noerr* immunity was expressly qualified by this Court when first enunciated. In what has come to be known as the "sham exception," the Court stated:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental actions, is mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

365 U.S. 127, 144 (1961). Petitioners' proposed amended complaint and Exhibit H annexed thereto states a claim under this very state of facts. Once again, the words of respondents clearly evidence their intent to use a publicity campaign for the sole purpose of discouraging their tenants from negotiating with petitioners:

> [RESPONDENT EAGAN:] All I can say to you now is this — we want to proceed with full steam ahead to litigate the heck out of them, *to get all the publicity we can for the express sole purpose now, at least — first of all, we hope we can stop them dead; if not, we can delay but in the meantime that we keep our tenants from being wooed away* over there on the strength that — we've got everything — heck, they haven't got it. (Emphasis supplied.)

One searches Exhibit H in vain for a description of the grievances that are to be the basis for the planned lawsuits or any consideration of their merits. There is not, however, a single word about a genuine attempt to achieve a just or speedy resolution of the legal disputes.

This same theme of interference is the subject of a later conversation between respondent Eagan and attorney Wilber several months *after* litigation was commenced. Again, to respondent Eagan the merits of the lawsuits are purely secondary:

> [RESPONDENT EAGAN:] So there is litigation on litigation. Where this is helpful is that it not only has its effect upon Byron, but it also has effect on where he'll try to get his financing, because the more publicity today I find that elections and everything are settled by publicity. I just went through that on the Chimes Building and I found it didn't matter what the heck the merits to the case were, it was what the newspapers decide to publish . . .
>
> [ATTORNEY WILBER:] Of course, we've been saying, strictly on the merits, that we're right, and I think that we are.
>
> [RESPONDENT EAGAN:] I agree with you but I don't think that's enough. I think you've got to have this publicity right now.

The instant case is unique, among all of *Noerr's* progeny, in meeting — literally — the sham exception expressed therein. The publicity campaign conceived by respondents was not First Amendment petitioning; the legislative effort was finished and litigation had commenced. Respondents' publicity campaign could not constitute a genuine attempt to influence the courts. Rather, it was a "mere sham" designed "to interfere directly with the business relationships" of petitioners. (365 U.S. at 144.) What *Noerr* recognized as sham in the political arena, the Court

of Appeals ought to have condemned in the judicial sphere. Its failure to do so is in conflict with *dictum* in *Noerr* itself.

II.

The Questions Presented By This Petition Are of Fundamental Constitutional Importance and Are in Need of Prompt Resolution By the Court.

Over the last two Terms, this Court has made enormous strides in eliminating confusing and, in some cases, obsolete notions surrounding the traditional antitrust exemptions. *E.g., National Broiler Marketing Ass'n. v. United States*, 98 S.Ct. 2122 (1978) (agricultural cooperatives); *National Society of Professional Engineers v. United States*, 98 S.Ct. 1355 (1978) ("learned professions"); *St. Paul Fire & Marine Insurance Co. v. Barry*, 98 S.Ct. 2923 (1978) ("boycott exception" to McCarran-Ferguson Act); *City of Lafayette v. Louisiana Power & Light Co., supra* (*Parker v. Brown* exemption). This process promises to continue during this Term. *E.g., Group Life and Health Ins. Co. v. Royal Drug Co.*, 556 F.2d 1375 (5th Cir. 1977), *cert. granted* 98 S.Ct. 1448 (Feb. 27, 1978).

Moreover, many of the cases before this Court last Term collaterally involved the *Noerr-Pennington* exemption. *E.g., City of Lafayette, supra, City of Impact v. Whitworth*, 559 F.2d 378 (5th Cir. 1977), *cert. granted, vacated and remanded* 98 S.Ct. 1642 (1978); *Pleasure Driveway and Park Dist. v. Kurek*, 557 F.2d 580 (7th Cir. 1977), *cert. granted, vacated and remanded* 98 S.Ct. 1642 (1978). Indeed, *Noerr-Pennington* was crucial to the reasoning of two opinions in *Vendo Co. v. Lektro-Vend Co.*, 433 U.S. 623 (1977) (concurring opinion of Mr. Justice Blackmun and dissenting opinion of Mr. Justice Stevens).

Despite the concern exhibited by the Court in the scope and treatment of antitrust exemptions, the *Noerr* exemption

remains in a state of confusion and disarray at the very time such issues abound.[6]

The case now before this Court is of special constitutional importance. For it raises not only important questions concerning the continued efficacy of the Sherman Act in an increasingly regulated business environment, but it addresses as well the proper scope of commercial speech and, more critically, the proper role served by the judicial branch of government.

Jurists, lawyers, and lawmakers are voicing mounting concern over the proliferating use and abuse of massive and repetitious litigation and pre-trial procedures. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). When called upon to do

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[6] *See, e.g., Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) (filing of false nomination forecasts with regulatory comission); *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972) (petitioning state motor vehicle commission for permanent injunction against competitor); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972) (interference with F.D.A. drug application); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976) (opposition before municipal board granting permits for restaurant operation); *Kurek v. Pleasure Driveway and Park Dist.*, 557 F.2d 580 (7th Cir. 1977) (coercion through economically unrealistic sham bid proposal); *Webb v. Utah Tour Brokers Ass'n*, 568 F.2d 670 (10th Cir. 1977) (opposition before I.C.C. to issuance of tour broker certificate); *Adolph Coors Co. v. A. & S. Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) (lawsuit seeking cessation of interstate transportation and sale of beer); *Associated Radio Service Co. v. Page Airways, Inc.*, 414 F.Supp. 1088 (N.D.Tex. 1976) (lawsuits instigated against competitor); *First Delaware Valley Citizens Television Inc. v. CBS, Inc.*, 398 F.Supp. 917 (E.D.Penn. 1975) (inducement by network of affiliate to intervene in F.C.C. proceedings); *Rush-Hampton Industries, Inc. v. Home Ventilating Institute*, 419 F.Supp. 19 (M.D. Fla. 1976) (lobbying before Code organizations for certain favorable specifications); *Mountain Grove Cemetery v. Norwalk Vault Co.*, 428 F.Supp. 951 (D.Conn. 1977) (baseless lawsuit); *Dollar Rent-A-Car Systems, Inc. v. Hertz Corp.*, 434 F.Supp. 513 (N.D.Calif. 1977) (petitioning for private airport concessions); *Cybory Systems, Inc. v. Management Science America, Inc.*, 1978-1 Trade Cases ¶61,927 (N.D. Ill. 1978) (trade secrets litigation); *Loctite Corp. v. Fel-Pro Inc.*, 1978-2 Trade Cases ¶62,204 (N.D. Ill. 1978) (patent infringement litigation).

so, this Court has readily distinguished the proper utilization of the judicial processes from pernicious and vexatious practices. *Compare In re Primus*, 98 S.Ct. 1893 (1978) *with Ohralik v. Ohio State Bar Ass'n*, 98 S.Ct. 1912 (1978). In these champerty cases, the fundamental distinction recognized in *N.A.A.C.P. v. Button*, 371 U.S. 415, 443 (1963) is reaffirmed:

> Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain.

Where the private gain exhibits the additional evil of restraint of trade, it can surely be condemned without "chilling" fundamental First Amendment values. Thus, the *Primus/Ohralik* distinction strikes at the very heart of the decisions below.

This Petition represents a special opportunity for this Court to make it abundantly clear that the First Amendment will not constitute a safe harbor for those that would misuse the courts for collateral, anti-competitive ends. As governmental regulation and scrutiny of business planning and practices increase, the temptation to subvert the adjudicatory processes to serve private unlawful objectives will surely grow. A timely pronouncement by this Court rejecting such conduct would be highly salutary.

Granting a writ herein would serve at once the twin values of economic liberty and fair, impartial and speedy justice. The decision of the Court of Appeals as it now stands does neither.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: September 27, 1978
Rochester, New York.

Respectfully submitted,

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BY: /s/ James M. Hartman
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Appendices

APPENDIX A

Judgment and Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of June, one thousand nine hundred and seventy-eight.

Present: HON. LEONARD P. MOORE, HON. WILLIAM H. MULLIGAN, HON. MURRAY I. GURFEIN, *Circuit Judges*,

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WILMORITE, INC., ET AL.,

Plaintiffs-Appellants,

against

EAGAN REAL ESTATE, INC., ET AL.,

Defendants-Appellees.

77-7625

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Edmund

Appendix A — Judgment and Order of the United States Court of Appeals for the Second Circuit

Port in 77-CV-47 (Sept. 29, 1977). There was no abuse of discretion by the district court in denying leave to file an amended complaint, because defendants' conduct, under the facts and theory therein alleged, was immune from liability under antitrust laws.

/s/ LEONARD P. MOORE
Leonard P. Moore

/s/ WILLIAM H. MULLIGAN
William H. Mulligan

/s/ MURRAY I. GURFEIN
Murray I. Gurfein

APPENDIX B

Memorandum-Decision and Order of the District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WILMORITE, INC., FAYETTEVILLE PLAZA, INC., AND JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL,

Plaintiffs,

v.

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO AND FATTI BUILDERS, INC., FRANK BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED AND DAVID C. MURRAY,

Defendants.

77-CV-47

Appearances:

HARRIS, BEACH, WILCOX, RUBIN AND LEVEY, Attorneys for plaintiffs, 2 State Street, Rochester, New York 14614. James M. Hartman, Esq., of Counsel.

BOND, SCHOENECK & KING, Attorneys for Eagan defendants, One Lincoln Center, Syracuse, New York 13202. N. Earle Evans, Jr., Esq., of Counsel.

HINMAN, HOWARD & KATTEL, Attorneys for Allied defendants, Security Mutual Building, Binghamton, New York 13901. Pamela S. Dwyer, Esq., of Counsel; Sullivan & Cromwell, 48 Wall Street, New York, New York 10005.

HANCOCK, ESTABROOK, RYAN, SHOVE & HUST, Attorneys for Pyramid defendants, One Mony Plaza, Syracuse, New York 13202. William L. Allen, Jr., Esq., of Counsel.

NIXON, HARGRAVE, DEVANS & DOYLE, Attorneys for Winmar defendants, Lincoln First Tower, Rochester, New York 14603. John Stuart Smith, Esq., of Counsel.

URCIUOLI & COVINO, Attorneys for Kimbrook defendants, 7145 Henry Clay Boulevard, Liverpool, New York 13088. Mario D'Arrigo, Esq., of Counsel.

NOTTINGHAM, PALTZ, CERIO AND ENGEL, Attorneys for defendant Murray, One Lincoln Center, Syracuse, New York 13202. Richard L. Engel, Esq., of Counsel.

BRYANT, O'DELL AND BASSO, Attorneys for defendant Pyramid Brokerage Co., 600 Powelson Building, Syracuse, New York 13202. John D. Bryant, Esq., of Counsel.

OOT, SETRIGHT AND CIABOTTI, Attorneys for defendant Oot, 500 Powelson Building, Syracuse, New York 13202. Victor J. Ciabotti, Esq., of Counsel.

R.J. AND P.R. SHANAHAN, Attorneys for defendant Reed, Onondaga Savings Bank Building, Syracuse, New York 13202. William F. Lynn, Esq., of Counsel.

EDMUND PORT, JUDGE

MEMORANDUM-DECISION AND ORDER

I. *THE MOTIONS*

In this $72,000,000 damage action for alleged violations of the antitrust laws, brought by a developer of regional shopping centers against competing developers of similar shopping areas and others in concert with them, the defendants have moved to dismiss the complaint for failure to state a claim or for summary judgment.

II. *THE COMPLAINT*

Accepting the material facts alleged in the complaint as true for the purposes of the motions to dismiss, *see Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976), it alleges as follows:

Plaintiffs.

Plaintiffs are developers and owners of regional shopping centers[1] in New York and other states. They developed and built Fayetteville Mall and are in the process of developing Great Northern Mall.

Defendants.

Twenty-seven defendants are named. They are mainly real estate investors and developers in Onondaga County. The Eagan

[1]Regional shopping centers are large shopping centers which seek to draw customers from a wide suburban area. They usually feature one or more anchor stores, branch outlets of major department store chains, and a variety of other retail establishments. *See* Plaintiffs' Memorandum 6-8. They are distinguished from residential shopping centers which are smaller neighborhood shopping centers, primarily featuring grocery stores, drug stores and the like. *See Beneke* v. *Board of Appeals* 51 Misc. 2d 20, 273 N.Y.S.2d 121, 125 (Sup. Ct. 1966).

defendants[2] are the largest real estate investors and brokers in the county, owning and operating three regional shopping centers, Shoppingtown, Fairmount Fair, and Penn Can Mall. The Kimbrook defendants[3] own and operate a Planned Unit Development (PUD) comprised of residential and commercial uses, in northern Onondaga County. The Kimbrook defendants are economically controlled by the Eagan defendants.[4] The Pyramid defendants,[5] who are independent of the other developers, own and operate regional shopping centers in Onondaga County including Seneca Mall, River Mall and Pyramid Malls. The Allied defendants[6] operate a department

[2]The Eagan defendants include Eagan Real Estate, Inc., Eagan Real Estate Management Corp., Eagan Real Estate, Leo T. Eagan, William Eagan and Edward Eagan. The individual Eagan defendants control the Eagan entities either as partners, officers, directors or shareholders. Defendant Winmar Company is a member of the joint venture operating Penn Can Mall along with the Eagan defendants. Winmar is otherwise unrelated to the Eagans. Defendant Barney is a vice-president of Winmar.

[3]The Kimbrook defendants include Kimbrook Realty, CFB Development Corp., Camperlino and Fatti Builders, Frank Fatti, William J. Camperlino and William A. Bargabos. Again, the individual defendants control the named entities as either partners, officers, directors or shareholders.

[4]A group of defendants bridges the Eagan and Kimbrook groups. Kimbrook Corp. is a partner in Kimbrook Realty which in turn operates the Kimbrook PUD. Defendants Paul D. Lonergan and Katherine M. Shea are officers of Kimbrook Corp. and also are employees of one of the Eagan interests. Through this chain, the Eagans allegedly control the Kimbrook defendants.

[5]The Pyramid defendants include Pyramid Development, Inc. and Michael Falcone. Another defendant, Pyramid Brokerage Company was named in the complaint. At argument on the motions to dismiss, however, plaintiffs agreed to discontinue the action against this defendant as it, apparently, was unrelated to the other Pyramid defendants. This was done.

[6]The Allied defendants are Allied Stores Corporation and Dey Brothers and Co., Inc.

store in Shoppingtown and are part of the joint venture now developing Penn Can Mall. In addition to these major defendants, various individuals[7] are named who either are related to one of the major groups of defendants or have participated in the opposition to plaintiffs' development in Onondaga County.

Fayetteville Mall.

In 1965 plaintiff, Wilmorite, Inc., planned to build a regional shopping center, Fayetteville Mall, in Fayetteville, New York. Plaintiff obtained an option to purchase a large tract of land known as Andrea Acres on which to build Fayetteville Mall. Fayetteville Mall would compete with Shoppingtown, located two miles away. In June of that year, efforts were initiated by plaintiffs to change the zoning of Andrea Acres from residential and agricultural to commercial. In January of 1967, the Manlius Town Board amended its zoning ordinance and rezoned Andrea Acres as "Regional Shopping District."[8]

Between June, 1965 and the change of the zoning ordinance creating the "Regional Shopping District", defendants conspired to obstruct its passage. They instigated opposition to the amendment among neighboring merchants and homeowners. They retained witnesses to appear on behalf of the homeowners at public hearings and created publicity adverse to the amend-

[7]Other individual defendants include Earl Oot, a real estate developer, John Murphy, an Eagan employee, Roger Smith, an expert on development of shopping centers, Arthur Reed, a planning consultant, and David Murray, M.D.

[8]Initially, the zone was changed from residential and agricultural to "Residential Shopping District." *See Beneke* v. *Board of Appeals*, 51 Misc. 2d 20, 273 N.Y.S.2d 121 (Sup. Ct. 1966). Subsequently, the land was rezoned, this time as "Regional Shopping District." See *Albright* v. *Town of Manlius*, 28 N.Y.2d 108, 320 N.Y.S.2d 50 (1971).

ment. They instigated and financed legal proceedings in opposition to the rezoning.

The first legal proceeding brought by any of the defendants occurred after plaintiffs' initial efforts to obtain a rezoning from the town authorities. These efforts had resulted in the creation of a "Residential Shopping District" zone for Andrea Acres. Although not alleged in the complaint, the proceeding was cited by defendants: *Beneke* v. *Board of Appeals*, 51 Misc. 2d 20, 273 N.Y.S.2d 131 (Sup. Ct. 1966). This was an Article 78 proceeding which annulled the affirmance by the Zoning Board of Appeals of the issuance of a building permit for Fayetteville Mall on the grounds that there was insufficient evidence for the building inspector to determine whether the mall would comply with the requirements for the "Residential Shopping District" which had been created at plaintiff's behest. Subsequently, the ordinance was further amended to create the "Regional Shopping District" in January of 1967.

The complaint further alleged that after the zoning ordinance was amended to create the Regional Shopping District, two suits were commenced challenging the amendment. One was brought by 148 neighboring property owners and the other by an individual resident of the town. Both, however, were organized and financed by various defendants including the Eagans and Allied. Although both actions were ultimately dismissed by the New York Court of Appeals in 1971,[9] they had been successful below. Justice Farnham of the New York State Supreme Court held the amendment void and invalid for lack of a comprehensive plan and for lack of public notice concerning various conditions on the

[9] *Albright* v. *Town of Manlius*, 28 N.Y.2d 108, 320 N.Y.S.2d 50 (1971).

use of Andrea Acres.[10] The Appellate Division reversed in part, holding that the amendment was enacted pursuant to a comprehensive plan, but affirmed as to the lack of notice of the conditions on the lands' use.[11]

The opposition to the zoning amendment and the subsequent lawsuits were organized and financed with the intent of delaying or preventing the development of Fayetteville Mall. Defendants intended to misuse the judicial process and to defeat the lawfully enacted zoning amendment in order to eliminate plaintiffs as competitors within Onondaga County. To that extent, the opposition and the lawsuits were "sham and wrongful legal proceedings in opposition to Fayetteville Mall."[12] More generally, defendants conspired to restrain trade, eliminate competition, prevent the development of plaintiffs' shopping center, limit the number of regional shopping centers and the extent of commercial space to be leased for that purpose, and finally, to monopolize the development of regional shopping centers within Onondaga County.

As a result of defendants' conduct, the construction of Fayetteville Mall was delayed for six years. The delay caused an increase in construction costs and a decrease in plaintiffs' profits. The delay further prevented plaintiffs from obtaining certain commercial tenants for Fayetteville Mall and enabled Shoppingtown to lease space to a major department store and

[10] The unreported decision in *Albright* v. *Town of Manlius*, Index No. 67-2797 (Sup. Ct., November 17, 1969), is attached to defendant Murray's motion papers.

[11] *Albright* v. *Town of Manlius*, 34 App. Div. 2d 419, 312 N.Y.S.2d 13 (4th Dept. 1970).

[12] Plaintiffs' Complaint ¶108(t).

other tenants who had earlier signed lease options for Fayetteville Mall.

Great Northern Mall.

After the dismissal of the Fayetteville Mall lawsuits in 1971,[13] defendants' conduct is free of complaint by the plaintiffs until 1975, when plaintiffs initiated plans to develop Great Northern Mall. This proposed mall would compete with defendants' regional shopping center, Penn Can Mall. Once again, the land involved was zoned residential and agricultural, and plaintiffs applied for a zoning change to permit the construction of a regional shopping center. At the same time, the Kimbrook defendants were applying for a zoning change to permit a 23 acre shopping center. By March of 1976, the zoning change for plaintiffs had been granted and Kimbrook withdrew its request.

Following the zoning change, litigation again ensued. In March, 1976, Kimbrook sued to declare the zoning amendment for Great Northern Mall invalid.[14] In June, Kimbrook brought another suit — an Article 78 to reverse the recommendation of the Onondaga County Planning Board which had recommended the change and the resolution of the Town Board of Clay by which the zoning amendment had been enacted. This latter case was dismissed by the court in December of 1976. As had been the case with the Fayetteville Mall litigation, both of these suits were brought at the direction of the Eagans and were encouraged and financed by those defendants along with Allied. In

[13] *See* note 9 *supra*.

[14] This suit has been discontinued with prejudice since the commencement of the case at bar. *See* Order of the Hon. Donald Miller, Justice of the Supreme Court of the State of New York, signed July 20, 1977.

addition, these two recent suits were also instigated and financed by the Pyramid defendants.

The same motives which had inspired the earlier Fayetteville Mall litigation are responsible for these two suits. Defendants intend to misuse the judicial process and defeat the zoning change in order to delay or prevent the development of Great Northern Mall. The "sham and wrongful legal proceedings"[15] are motivated by anticompetitive and monopolistic purposes. Finally, the suits are affecting Great Northern Mall in the same manner that the earlier litigation affected Fayetteville Mall: Development and construction are delayed; costs are increased; profits are lost; plaintiffs are prevented from entering into leases; and competition is restricted.

Plaintiffs request the court to declare defendants' actions unlawful in violation of the Sherman Act's prohibitions on restraint of trade, 15 U.S.C. §1, and monopolies, 15 U.S.C. §2, and also in violation of New York law. An injunction against further unlawful activity is requested. In addition, claiming damages of $24,000,000, plaintiffs request judgment for $72,000,000, or treble damages on the antitrust claims, and $24,000,000 on their unfair competition claim. Lastly, costs and attorneys' fees are asked for.

[15] *Plaintiffs' complaint* ¶108(ee).

III. *CONTENTIONS*

The contentions of the parties boil down to the confined issue of whether the facts before me insulate the defendants from antitrust liability under the *Noerr-Pennington* doctrine,[16] or bring the case within the sham exception[17] to that doctrine.

For the reasons stated, I find the defendants' conduct to be within the protection of *Noerr-Pennington* and, consequently, the defendants' motions to dismiss the complaint in its entirety are granted.[18]

IV. *DISCUSSION*

The *Noerr-Pennington* doctrine has its genesis in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)(*Noerr*). The defendants in *Noerr*, twenty-four railroads, a trade association of their presidents, and a public relations firm, were charged with conspiring to restrain trade and monopolize the long distance freight business. Plaintiffs, various truckers and trucking interests, alleged that defendants had engaged in a publicity campaign whose sole motivation was to destroy competition; that defendants had used the third party technique, i.e., adverse publicity prepared by defendants was misrepresented as the views of independent persons; and that

[16] *See Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

[17] *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

[18] Defendants contend that once the federal claims are dismissed, the state claims should be dismissed for lack of pendent jurisdiction. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). At oral argument plaintiffs conceded that, if the federal claims are dismissed, the entire complaint should then be dismissed as well.

defendants had attempted to influence legislation and had pursuaded the Governor of Pennsylvania to veto a pro-truckers measure.

The district court found that the defendants' publicity campaign was malicious, intended only to destroy competition and the plaintiffs' good will, and fraudulent through use of the third party technique. The district court held for the plaintiffs finding that defendants' publicity campaign violated the Sherman Act, although it refused to impose liability based on the veto of the truckers' legislation.[19] *Id.* at 133.

The Supreme Court reversed. As its starting point it acknowledged, as the district court had, that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135. This is true even if such laws would produce a restraint or monopoly. The court reasoned that

> [i]n a representative democracy such as this, these branches of government [, legislative and executive,] act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.

Id. at 137. The Sherman Act was intended to regulate business, not politics. Furthermore, the exercise of the First Amendment right to petition the government could be jeopardized by imposing antitrust liability in these circumstances.

[19] Defendants counterclaimed in like tenor that plaintiffs' publicity campaign violated the Sherman Act. The counterclaim was dismissed. The district court found that plaintiffs' publicity campaign was defensive in nature, designed only to influence legislation and not to destroy the railroads as competitors. Thus no Sherman Act liability was imposed on the truckers. *Noerr*, *supra*, 365 U.S. at 134.

Having concluded that no antitrust liability attaches to "mere solicitation of governmental action", *Id.* at 138, the Court considered whether certain factors removed defendants' publicity campaign from the shield of antitrust immunity. First, defendants' anticompetitive motive was of no consequence. Even though defendants' "sole purpose . . . was to destroy the truckers as competitors", *Id.*, solicitation of government action remained immune. Secondly, even if the court finds the deception of the public and public officials to be deliberate and reprehensible, that is "of no consequence so far as the Sherman Act is concerned." *Id.* at 145. Finally, the district court's finding that defendants intended to injure plaintiffs, even if they secured no legislation, was held again not to create liability. All the evidence dealt with defendants' efforts to influence the passage and enforcement of law. "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers." *Id.* at 142. Any fallout from defendants' campaign which injured plaintiffs was incidental and insufficient for creating antitrust liability. Characterizing the case as a "no-holds-barred fight", *Id.* at 144, between plaintiffs and defendants, which had been fought "along lines normally accepted in our political system", *Id.* at 145, the Court removed the case from the purview of the Sherman Act.

The Court, however, did leave room for antitrust liability under certain circumstances.

> There may be situations in which a publicity campaign ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor and the application of the Sherman Act would be justified.

Id. at 144. But it concluded that those circumstances were not presented by the facts before it.[20]

The Supreme Court reaffirmed *Noerr* in a suit between trustees of the United Mine Workers retirement fund and coal company owners. *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965) (*Pennington*). In the district court, defendant coal companies won a verdict on their counterclaim that the union had squeezed smaller mines out of operation in violation of the antitrust statutes as part of its efforts to recover higher wages for miners. The district court had let the jury consider attempts by the union to influence TVA officials and the Secretary of Labor, insofar as such conduct was motivated by illegal intent. The Supreme Court reversed. "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 670. The Court went further than *Noerr,* however, and immunized such activity even if accompanied by conduct proscribed by antitrust law.

The principles of *Noerr* were extended to proceedings before administrative agencies and the courts in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972) (*Trucking Unlimited*). "The right of access to the courts is indeed but one aspect of the right of petition." *Id* at 510. *Trucking*

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> But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also *highly successful.* Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case.

Noerr, supra, 365 U.S. at 144 (emphasis added).

Unlimited also outlined the requirements for stating a claim under the sham exception to *Noerr*.

Plaintiffs in *Trucking Unlimited* were truckers operating in California; defendants were truckers operating both within California and in interstate commerce. Plaintiffs alleged that defendants conspired to destroy competition and put plaintiffs and others out of business. Defendants' conspiracy was allegedly "a concerted action . . . to institute state and federal proceedings to resist and defeat applications by [plaintiffs] to acquire operating rights or to transfer or register those rights." *Id.* at 509. More critical were other allegations which claimed that defendants' power and resources were used to deter plaintiffs' use of administrative and judicial proceedings "so as to deny them 'free and unlimited access' to those tribunals." *Id.* at 511.[21]

> [T]he allegations are not that the conspirators sought "to influence public officials," but that they sought to bar

[21]Mr. Justice Stewart's concurring opinion summarizes the complaint as follows:

> The complaint contains allegations that the petitioners have:
>
> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing 'with or without probable cause and regardless of the merits' every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program.

Trucking Unlimited, supra, 404 U.S. at 518.

> their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process.

Id. at 512. Plaintiffs further alleged that defendants initiated proceedings "with or without probable cause, and regardless of the merits of the cases." *Id.* Defendants' conduct indicated a purpose and intent to deprive plaintiffs of access to the agencies or courts— " 'to discourage and ultimately to prevent [plaintiffs] from invoking' the processes of the administrative agencies and courts and thus [fell] within the exception to *Noerr*." *Id*

Perjury, bribery and misrepresentations in the adjudicatory process corrupt it and effectively bar access to agency action or the courts.

Such circumstances state a claim within the sham exception to *Noerr*. Justice Stewart, concurring in the judgment but not in the court's opinion, noted that the complaint alleged that the defendants conspired not to invoke the processes of the courts and the administrative agencies, but to prevent plaintiffs from invoking these processes. *Id.* at 518.

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973), (*Otter Tail*) is also relied upon by plaintiffs to support their claim that defendants' use of the administrative and judicial process was a sham. *Otter Tail* was a suit against a power company for monopolization of the retail distribution of electric power. The district court found that defendant had refused to sell or distribute power wholesale to municipally owned electric companies, had denied the municipal companies access to other suppliers of power, and had brought litigation to prevent the establishment of municipal electric companies. Defendants' actions had occurred in retaliation for municipalities terminating their franchises with defendant and seeking to establish their own electric systems. The district court's decision rendered prior to *Trucking Unlimited* held "*Noerr* does not free

from antitrust sanctions the institution of court litigation." *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 62 (D. Minn. 1971). Consequently, the district court made no findings as to whether the litigation brought by Otter Tail was within the protective cover of *Noerr* or was sham and outside it. The allegations and proof of Otter Tail's conduct distinguish it from this case. The Supreme Court remanded for consideration in light of *Trucking Unlimited.*[22]

The thrust of these cases is that the First Amendment protects citizens in their efforts to petition any branch of the government. This protection is afforded, even if such action is anticompetitive or monopolistic, by immunizing it from liability under the antitrust laws. There is a limit to this protection, however; the immunity is lost of the challenged activity is in fact sham.

Plaintiffs argue that the more recent Supreme Court opinions have abrogated the *Noerr-Pennington* doctrine. They argue that the language of *Trucking Unlimited* and *Otter Tail* has extended the sham exception to *Noerr* so far that the exception literally swallows the rule of *Noerr*. This reading of the Supreme Court's opinion is unfounded.

Trucking Unlimited is based on the notion that the defendants could so abuse the adjudicatory process as to deny plaintiffs meaningful access to that forum. By such action, defendants could control the judicial or administrative process and thereby arrogate the adjudicatory function. This notion accords with *Noerr*; it does not weaken or restrict the basic thesis of *Noerr*.

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[22]On remand the district court found that Otter Tail's repetitive use of litigation was designed mainly to preserve its monopoly and was "sham." *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd*, 417 U.S. 901 (1974).

The interest sought to be protected by *Noerr* was access to the various arms of the government. The First Amendment right of petition guarantees all citizens the right to appeal to the legislature or the judiciary. This right is not conditioned upon motive. The defendants in *Noerr* and *Pennington* were within their rights in seeking to influence the passage of legislation for reasons of personal gain. The vice in *Trucking Unlimited* was action which denied others access to the adjudicatory tribunal. In that case, defendants' abuse of the process rather than its legitimate use prevented plaintiffs from freely exercising their First Amendment right of petition through administrative and judicial channels. Thus, the defendants in *Trucking Unlimited* could not avail themselves of *Noerr's* antitrust immunity, since this immunity grows out of respect for the free exercise of First Amendment freedoms.

The allegations of the complaint in *Trucking Unlimited* charged "that the power, strategy, and resources of the petitioners [defendants] were used to harass and deter respondents [plaintiffs] in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals", *Trucking Unlimited, supra,* 404 U.S. at 511, resulting in effectively barring their use by the plaintiffs. No such charges can be made out against the defendants here on the material before me.

Noerr remains the guiding principle and *Trucking Unlimited* is its logical application. Appeal to the government, including use of the judicial process by instigation or commencement of lawsuits, cannot alone be the basis for antitrust liability. Rather, it is the corruption of the administrative or judicial process that removes the shield of antitrust immunity provided by *Noerr*.

This reading of *Noerr* and *Trucking Unlimited* is supported by the reported cases. All of the cases which have refused to permit defendants to avail themselves of *Noerr's* immunity have rested on conduct which effectively denied plaintiffs the right of access to an arm of the government. The merits of the views pressed are only material if they illumine access-barring conduct.

In *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (*Woods*), the Fifth Circuit refused to extend the immunity of *Noerr* to defendants who had filed false information before a Texas regulatory agency. Woods was decided before the Supreme Court's opinion in *Trucking Unlimited*, *supra*, 404 U.S. 508 (1972), and interpreted the Ninth Circuit's opinion in that case to hold "*Noerr-Pennington inapplicable to the alleged filing of false nominations by defendants because this conduct was not action designed to influence policy*, which is *all* the *Noerr-Pennington* rule seeks to protect." *Woods*, *supra*, 438 F.2d at 1298 (emphasis added). It held "[i]n light of this determination ... that the abuse of the administrative process here alleged does not justify antitrust immunity." *Id.* Having found that the administrative process was corrupted by the filing of false information, the result reached in *Woods* undoubtedly brings it within the sham exception of *Noerr-Pennington*. However, the Fifth Circuit's restricted view of *Trucking Unlimited* was dispelled when the Supreme Court emphasized that "[t]he right of access to the courts is indeed but one aspect of the right of petition." *Trucking Unlimited*, *supra*, 404 U.S. at 510.

Woods was followed by the District of Columbia Circuit in *Israel* v. *Baxter Laboratories, Inc.* 466 F.2d 272 (D.C. Cir. 1972) (*Israel*). *Israel* was a suit which grew out of efforts to induce the FDA to bar one of plaintiff's drugs from the market. Plaintiff

alleged that defendants had suppressed, concealed and misconstrued information before the FDA. In reversing the district court's grant of summary judgment in favor of defendants, the court of appeals construed *Woods* in conjunction with the recent decision of the Supreme Court in *Trucking Unlimited* and emphasized defendants' abuse of the administrative proceedings.

> The basic concern of the courts of appeal (and one District Judge) in both *Woods* and *Trucking Unlimited* may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption.

Id. at 278 (footnotes omitted). The Tenth Circuit has similarly construed the sham exception to *Noerr*.

> [T]he term "sham" in this context would appear to mean misuse or corruption of the legal process. Therefore, the utilization of the court or administive agency in a manner which is in accordance with the spirit of the law continues to be exempt from the antitrust laws.

Semke v. *Enid Automobile Dealers Association*, 456 F.2d 1361, 1366 (10th Cir. 1972). *See also Mountain Grove Cemetery Association* v. *Norwalk Vault Co.*, 428 F. Supp. 951, 955 (D. Conn. 1977); *Associated Radio Service Co.* v. *Page Airways Inc.*, 414 F. Supp. 1088, 1096 (N.D. Texas 1976).

Applying these principles to the present case, the conduct attributed to the defendants is within the protective cover of *Noerr*. In broad brush conclusory allegations the defendants are charged with illegal actions before the Town Boards of Manlius and Clay, in connection with proposed amendments to their zoning ordinances, and with unlawfully contesting the zoning amendments in the courts of New York State.

In considering amendments to their zoning ordinances, the town boards were acting in a legislative capacity. *See Berenson* v. *Town of New Castle*, 38 N.Y.2d 102, 111, 378 N.Y.S.2d 672, 682 (1975); *Thomas* v. *Town of Bedford*, 11 N.Y.2d 428, 433, 230 N.Y.S.2d 684, 687 (1962). *Noerr*, *supra*, 365 U.S. 127, shields attempts to influence legislative action from the reach of the antitrust laws.

In *Bob Layne Contractor, Inc.* v. *Bartel*, 504 F.2d 1293 (7th Cir. 1974), the plaintiff, a subdivider, successfully obtained a change of zone from residential to commercial for part of a large residential subdivision being developed by it. The change of zone was opposed by an association of residents of the subdivision. The defendants in the antitrust suit included eleven property owners in the subdivision who had commenced an action in the state court to enforce a restrictive covenant common to the tract limiting the property to residential use. There were also named as defendants the majority shareholder and the corporate owner of a nearby subdivision, as well as a retail store in the same community and its partner corporation. The stockholder and the retail store both contributed to a fund to oppose the change of zone. Although the contributing subdivider and retail store would both suffer economic damage from the change of zone, their cooperation with the other defendants to defeat the change of zone did not deter the court of appeals from affirming summary judgment in defendants' favor. *Id.* at 1296.

In other contexts, where defendants have appealed in their own interests to local legislative bodies, such appeals have been immunized from attacks under the antitrust laws. *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3634 (March 21, 1977) *(Franchise Realty)* (opposition before the San Francisco Board of Permit Appeals to

the grant of building permits for McDonalds restaurants); *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th cir. 1975) (activity inducing city council not to grant plaintiffs a franchise for cable TV).

Similarly, allegations that defendants commenced lawsuits or instigated their commencement, do not give rise to antitrust liability. The immunity created by *Noerr* extends to efforts to petition for relief of grievances through the judicial process. *Trucking Unlimited, supra*, 404 U.S. at 510. *Mountain Grove Cemetery Association* v. *Norwalk Vault Co.*, 428 F. Supp. 951 (D. Conn. 1977); *Central Bank of Clayton* v. *Clayton Bank*, 424 F. Supp. 163 (E.D. Mo. 1976); *Ernest W. Hahn, Inc.* v. *Codding*, 423 F. Supp. 913 (N.D. Cal. 1976); *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966 (E.D. Pa. 1975). *See also Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.*, ____F.2d____, 46 U.S.L.W. 2104 (6th Cir., August 12, 1977).

Plaintiffs acknowledge that opposition to zoning amendments and subsequent litigation, standing alone, are protected by *Noerr*. They contend, however, that the complaint alleges facts that bring it within the sham exception to *Noerr*. Their basic argument is that defendants' opposition to the zoning amendment was intended to delay or prevent the construction first of Fayetteville Mall and later of Great Northern Mall. They did not legitimately oppose the zoning amendments, but sought to monopolize the operation of regional shopping centers in Onondaga County and thereby to restrict competition. They did not properly invoke the courts but, rather, intended to misuse the judicial process for anticompetitive and monopolistic purposes. This abuse of the judicial forum is allegedly demonstrated by the ultimate dismissal of three of defendants' suits; plaintiffs contend that defendants' conduct amounts to a "*pattern of abusive resort to adjudicatory tribunals.*" Plaintiffs' Memorandum 51.

Defendants' opposition to the proposed zoning amendments before the Town Board of Manlius and Clay does not fall within the sham exception to *Noerr*. Defendants' instigation and financing of opposition to the zoning amendments does not rise to the level of sham. In *Noerr*, the use of the third party technique, which involved misrepresentations and which was characterized as unethical, did not remove the shield of antitrust immunity from the defendants' actions. The allegations herein fall short of those in *Noerr* and, therefore, are clearly insufficient to state a claim under the sham exception.

Access-barring has been applied in the legislative setting, as well as the adjudicatory. In *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), defendants prevailed upon the city council not to hold a hearing on plaintiff's application for a cable TV franchise. Even this was insufficient to remove the shield of *Noerr*. Since plaintiffs could gain access to council members through informal channels, the denial of a formal hearing did not amount to a denial of access. In *Franchise Realty, supra*, 542 F.2d 1076, the absence of any allegations that plaintiffs were deterred from applying to the San Francisco Department of Public Works for building permits removed the case from the sham exception. This despite the presence of general allegations of access-barring. In the case at bar, plaintiffs have totally failed to state a claim that access to the town boards has been denied. The complaint shows that plaintiffs initiated the zoning proceedings. They applied for the zoning amendments for their regional shopping centers and both requests for amendments were granted. This is hardly access-barring. While plaintiffs argued that defendants "seek effectively to bar plaintiffs from all municipal zoning boards in Onondaga County", Plaintiffs' Memorandum 65, the allegations of the complaint obviously bely this assertion.

Plaintiffs next argue that defendants' lawsuits challenging the zoning amendments state a claim under the sham exception. Allegedly, the suits challenging the zoning amendments were brought with anticompetitive and monopolistic purpose: Defendants intended to delay and ultimately to prevent plaintiffs from entering the Onondaga County market for regional shopping centers. This intent assertedly removes the shield of *Noerr* and brings the case within the boundaries of the sham exception.

However, the Supreme Court explicitly held that intent does not alter the protection afforded by the First Amendment.

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Noerr, supra, 365 U.S. at 139. The right to pursue or protect personal interests through the adjudicatory process is no less entitled to the same protection. *Noerr* went on to hold that, insofar as defendants' actions were "directed toward obtaining governmental action, [their] legality was not at all affected by any anticompetitive purpose [they] may have had." *Id.* 140. This basic principle was unchanged by the decision in *Trucking Unlimited.* In that case the Court noted that the complaint alleged anticompetitive and monopolistic purposes behind defendants' conspiracy. But the Court then discussed this alleged intent in the context of access-barring allegations which were described as more critical. *Trucking Unlimited, supra*, at 511. The gist of *Trucking Unlimited* is access-barring; motive is important to the extent that defendants, by resorting to the courts, intended to bar plaintiffs' access to that forum.

Ernest W. Hahn, Inc. v. *Codding*, 423 F. Supp. 913 (N.D. Cal. 1976), is a case similar to the one at bar. Plaintiffs were developers of regional shopping centers; defendants were competing developers. Plaintiffs claimed that defendants had conspired to bring a series of baseless lawsuits with the purpose of precluding plaintiffs from obtaining necessary bonding and, thus, preventing plaintiffs from building competing shopping centers. The suits were intended to delay construction, create additional costs for plaintiffs and ultimately make development economically unfeasible. The court dismissed the complaint for failure to state a claim. It held that defendants' anticompetitive motive for suing did not create Sherman Act liability. Actions protected by the First Amendment under *Noerr* did not lose that protection because of defendants' anticompetitive intent. *Id.* at 916-17. The court pointed out how easily an antitrust complaint, such as the one here, can carry the germ of the very disease it purports to attack.

> The court made clear that conclusory allegations of access bar were not enough, since a complaint which could survive motions to dismiss because such a conclusory allegation was pleaded might deter a competitor from presenting its views in the public forum.

Id. at 916 (citing *Franchise Realty*).

Other cases have reaffirmed the principle that access-barring is the cornerstone to the sham exception. *Mountain Grove Cemetery Association* v. *Norwalk Vault Co.*, 428 F. Supp. 951 (D. Conn. 1977); *Central Bank of Clayton* v. *Clayton Bank*, 424 F. Supp. 163 (E.D. Mo. 1976); *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966 (E.D. Pa. 1975). These cases emphasized the need for alleging abuse, not mere use, of the adjudicatory process. In the instant case plaintiffs have not alleged any unethical or corrupt actions on the part of defendants in suing to declare the zoning

amendments void. It is not alleged that perjury, bribery, misrepresentations, or any improprieties occurred during the litigation. Mere use of the state courts to challenge zoning amendments through Article 78 proceedings cannot be characterized as an abuse of the judicial process. On the contrary, it is one of the facets of the First Amendment right of petition protected by *Noerr*.

Mountain Grove Cemetery Association, *Central Bank of Clayton*, and *Bethlehem Plaza* involved single lawsuits by the defendants. All three cases noted that no "pattern of baseless, repetitive claims", *Trucking Unlimited*, *supra*, 404 U.S. at 513, was alleged. *Trucking Unlimited* stated that such a pattern may evidence an intent to abuse the judicial process and bar plaintiffs from access to the courts. In the present case, however, no such pattern appears.

Three proceedings were instituted to invalidate the change of zone obtained by the plaintiff in connection with Fayetteville Mall. Kimbrook has instituted two proceedings in connection with the change of zone for Great Northern Mall.

The first suit instituted in connection with Fayetteville Mall resulted in a disposition favorable to the defendants herein.[23] The other two actions were consolidated. The defendants herein prevailed in the trial court[24] and were partially successful in the Appellate Division,[25] the determination of which was ultimately reversed by the Court of Appeals.[26]

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[23] *Beneke* v. *Board of Appeals*, 51 Misc. 2d 20, 273 N.Y.S.2d 121 (Sup. Ct. 1966).

[24] *See* note 10 *supra*.

[25] *See* note 11 *supra*.

[26] *See* note 9 *supra*.

The first Kimbrook action resulted in a dismissal in the trial court from which an appeal was filed.[27] The second proceeding, an Article 78 and declaratory judgment action, was terminated by an order of discontinuance with prejudice on motion of Kimbrook. Kimbrook moved for such disposition after the town board had granted it relief on its application for a change of zone permitting a shopping center within its Planned Unit Development and after the town board had passed a further resolution in connection with the change of zone obtained by the plaintiffs. In Kimbrook's view, these actions of the Clay Town Board eliminated its objections to the change of zone granted Wilmorite.[28]

These are hardly the threads from which a "pattern of baseless, repetitive claims", *Trucking Unlimited, supra*, 404 U.S. at 513, can be woven. Free access to the courts does not mean unopposed access. *Franchise Realty, supra*, 542 F.2d 1086 (Markey, J. Concurring).

Plaintiffs argue that the Supreme Court's opinion in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), supports their assertion that the mere filing of lawsuits constitutes access-barring conduct. Plaintiffs contend that defendants' suits achieve their anticompetitive purposes through the *in terrorem* impact which the suits exert on plaintiffs.

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[27]*See* Plaintiffs' Memorandum 54; Eagan Defendants' Memorandum 21.

[28]*See* Order of the Hon. Donald H. Miller, Justice of the Supreme Court of the State of New York, July 20, 1977. Certified copies of Justice Miller's Order, Kimbrook's motion, and supporting papers were provided to the court by Kimbrook's attorney herein; copies were forwarded to all counsel. These papers have been made a part of the Clerk's file in this action.

After receipt of these papers, plaintiffs' counsel acknowledged the fact of the discontinuance of Kimbrook's state court action but disputed the materiality of this fact to the instant suit.

Plaintiffs have overstated the holding in *Otter Tail.* The *Supreme Court* merely remanded the case for consideration under *Trucking Unlimited,* because the district court had held *Noerr* inapplicable to the judicial setting. The Supreme Court's opinion is silent as to whether the allegations fall under the protection of *Noerr* or within the sham exception. On remand the district court merely found that the repetitive litigation brought by defendant was "designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly." *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd*, 417 U.S. 901 (1974). The district court held that this litigation came within the sham exception to *Noerr.* What plaintiffs overlook in relying on *Otter Tail* is that defendant's conduct there was part of a larger unlawful scheme characterized by monopolistic practices. The district court had earlier found that Otter Tail had refused to sell or distribute power to municipal systems and had denied these systems access to other suppliers of power. In addition, the litigation brought by defendant made it impossible to obtain a "no-litigation certificate"[29] thereby precluding proposed municipal electric systems from obtaining bonding necessary for their establishment. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 368-72 (1973).

Plaintiffs' reliance on *Associated Radio Service Co.* v. *Page Airways, Inc.*, 414 F. Supp. 1088 (N.D. Tex. 1976), which denied a motion to dismiss, disregards similar allegations. Defendants in that case were alleged to have conspired to commit a series of acts including interference with business relationships, pirating of proprietary information, destruction of plaintiff's records, and spurious litigation. In such a context, which included allegations of attempts "to manipulate the court system", *Id.* at

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[29]*United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 62 (D. Minn. 1971).

1096, plaintiff's contention that the complaint stated a claim under the sham exception was sustained.

Otter Tail and *Associated Radio* both held that defendants' use of litigation came within the sham exception when it was part of a larger scheme employing unprotected anticompetitive and monopolistic practices. In the case at bar, plaintiffs allege only that defendants opposed zoning amendments and litigated their validity. These actions are all protected by the First Amendment. No actions violating the antitrust laws and not implicating the First Amendment are alleged. Defendants conducted no broad scheme of monopolistic activity of which litigation was only a part. *See Ernest W. Hahn, Inc.* v. *Codding*, 423 F. Supp. 913, 916 (N.D. Cal. 1976).

Finally, defendants argue that *Noerr's* vitality has been seriously undermined by the recent decision in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). They contend that *Noerr* is derived from *Parker* v. *Brown*, 317 U.S. 341 (1943), and that "*Cantor* dramatically reduces the antitrust immunity formerly granted under *Parker* v. *Brown*." Plaintiffs' Memorandum 67. Plaintiffs ignore that *Noerr* is based not only on *Parker*, but also on respect for the First Amendment. Furthermore, *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895 (June 27, 1977), emphasizes that plaintiffs' concern for the continuing vitality of *Parker* is misspent. The Court in *Bates*, although divided as to the First Amendment issue, was unanimous in its affirmance of "the Arizona Supreme Court's determination that appellants' Sherman Act claim is barred by the *Parker* v. *Brown* exemption." *Id.* at 4898.

Although the defendants' motions to dismiss the complaint were based on Rule 12(b)(6), Fed. R. Civ. P., the plaintiffs addressed themselves extensively to the sufficiency of the complaint under Rule 8, Fed. R. Civ. P. Although this fifty-page complaint would not likely be termed the short statement

required by Rule 8, failure to comply with that rule has not been considered by me. In discussing Rule 8, plaintiffs cite *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976), for the proposition that dismissals in antitrust cases should be granted sparingly before the plaintiff has had an opportunity for discovery. Plaintiff's Memorandum 33. Plaintiffs also contend that leave to replead should be granted for noncompliance with Rule 8. Plaintiffs' Memorandum 78. Neither of these principles is absolute. *See George C. Frey Ready-Mixed Concrete, Inc.* v. *Pine Hill Concrete Mix Corp.*, 554 F.2d 551 (2d Cir. 1977) (*Frey*).

The dismissal here is on substantive grounds and not for failure to comply with Rule 8. Accordingly, "the well-pleaded material facts alleged in the complaint [have been] taken as admitted." *Id.* at 553 (citing *Gumer* v. *Shearson, Hammill & Co.*, 516 F.2d 283, 286 (2d Cir. 1974). And because this is an antitrust action within the protection of the *Noerr-Pennington* doctrine, its dismissal prior to discovery is not inappropriate. *See Frey, supra*, 554 F.2d 555, and cases cited therein.

Ordinarily, upon a dismissal for failure to state a claim, I would grant leave to amend the complaint. In this case, however, no purpose would be served by denying an absolute dismissal at this time. Upon the oral argument, under questioning by the court, plaintiffs' counsel stated that all of the relevant facts, other than evidentiary details, which existed in support of plaintiffs' claim were alleged in the complaint. The allegations of the complaint, as fleshed out by the additional material supplied and considered by me,[30] clearly demonstrate the lack of factual

[30] In addition to the materials supplied the court through affidavits, exhibits, published and unpublished opinions relating to Fayetteville Mall and Great Northern Mall, *see* notes 8-11 *supra*, I received a letter dated August 2, 1977, from Kimbrook's attorneys. *See* note 28 *supra*. Copies of the letter and enclosures were forwarded to all attorneys for response and plaintiffs' counsel did respond.

issues and the entitlement of defendants to summary judgment dismissing the complaint.

The complaint should be dismissed against all defendants. Since the grounds discussed herein are dispositive of all motions made, it is unnecessary to consider the motions to dismiss the complaint as against individual defendants based on specific deficiencies in the complaint. Having considered matters outside the complaint, for the reasons herein, it is

ORDERED, that the defendants' motions to dismiss the complaint be and the same hereby are treated as motions for summary judgment, Rule 12(b)(6) Fed. R. Civ. P.; and it is further

ORDERED, that said motions be and the same hereby are granted in all respects; and it is further

ORDERED, that the clerk enter a judgment dismissing the complaint herein, as to all defendants.

/s/ EDMUND PORT
Senior United States District Judge

Dated: Auburn, New York
September 29, 1977

APPENDIX C
Constitutional and Statutory Provisions

A. *United States Constitution:*

Amendment I — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

B. *Sherman Act* (15 U.S.C. §§1 *et seq.*):

Section 1 — Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 — Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

C. *Clayton Act* (15 U.S.C. §§12-27):

Section 4 — Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC. and JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL,

Petitioners,

v.

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO AND FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED and DAVID C. MURRAY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF WILMORITE, INC. *ET AL.* FILED ON BEHALF OF EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK CORP., PAUL D. LONERGAN, KATHERINE M. SHEA and JOHN MURPHY

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC. and JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL,

Petitioners,

v.

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO AND FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED and DAVID C. MURRAY,

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This brief is submitted in opposition to the petition for a writ of certiorari, filed by petitioners Wilmorite, Inc. *et al.*, to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 30, 1978.

This is an antitrust action in which interstate real estate developers seek $72,000,000 in damages because residents of upstate New York, assisted and encouraged by some respondents, opposed efforts to construct two large shopping centers in their residentially-zoned neighborhoods by recourse to the zoning laws. Their opposition consisted primarily of litigating in court the validity of amendments to zoning ordinances obtained by petitioners. The petition for certiorari focuses almost exclusively on this litigation activity. The complaint also alleged that respondents generated adverse publicity and promoted opposition to the ordinances in hearings before local zoning officials.

The courts below held, without dissent, that such activity was outside the reach of the antitrust laws, under the well-established *Noerr-Pennington* doctrine.[1] Accordingly, summary judgment was entered and the complaint was dismissed. The petition for a writ of certiorari offers no reason why this judgment should be reviewed, much less reversed. The conduct alleged falls squarely within the principles of *Noerr* and *Pennington*, the lower courts have consistently applied those principles to such conduct, and no conflict among the circuits or special circumstances are suggested. The petition should be denied.

Statement of the Case

Petitioners are owners and developers of regional shopping centers both in and outside of New York State. The 27 named respondents, defendants below, for the most part are individuals and business entities active in the Syracuse

1. *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 126 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

area; they include local real estate developers in competition with petitioners, their shareholders and employees, a department store chain, two planning consultants and a local doctor who headed a citizens committee in opposition to one of petitioners' proposed new shopping centers.[2]

In 1965, petitioners acquired a tract of land in Onondaga County (on which they eventually built Fayetteville Mall Shopping Center). In June of 1965, they obtained a zoning change from the Town Board and soon thereafter applied for a building permit which was approved by the Board of Appeals the very next day. Litigation was promptly commenced by local citizens challenging the zoning change.

In this first example of what petitioners argued below was a "pattern of baseless litigation," the citizens won: The zoning application had been granted by an improper procedure and on insufficient data, and the local board of appeals had exercised discretion beyond its power in affirming the decision, *Beneke* v. *Bd. of Appeals*, 51 Misc. 2d 20, 25, 273 N.Y.S.2d 121, 127 (Sup. Ct. Onondaga Co. 1966). Petitioners never appealed this adverse decision. Nowhere in their petition to this Court do petitioners mention this opening round in the "multiple repetitive zoning lawsuits."

Later, a second proposed zoning ordinance was submitted, but the Town Board rejected it. Various respondents were involved in marshalling local opposition to that

2. This brief is submitted on behalf of the Eagan group of respondents. They owned and operated shopping centers located near the two sites petitioners proposed to develop. The Allied respondents were major tenants of the Eagans. The Kimbrook respondents owned and operated a Planned Unit Development in Northern Onondaga County near one of petitioners' sites and allegedly are controlled by the Eagans.

rejected ordinance, just as they had been involved in the successful *Beneke* action.[3]

Petitioners' third attempt to obtain zoning relief succeeded at the legislative level. Promptly, thereafter, 148 area residential property owners commenced an action for a judgment declaring this rezoning to be invalid. *Albright, et al.* v. *Town of Manlius, et al.* A parallel action, *Schaff* v. *Town of Manlius, et al.*, was later commenced seeking similar relief; the two actions were then consolidated.

Once again, the citizens prevailed; the trial court held that the zoning amendments were not in conformity with a comprehensive plan and that notice precedent to their enactment was insufficient. Petitioners appealed to the State Appellate Division, but the five judges of that court unanimously affirmed the trial court's finding that the zoning change was illegal by reason of inadequate notice. *Albright* v. *Town of Manlius,* 34 A.D.2d 419, 312 N.Y.S.2d 13 (4th Dept. 1970).

Petitioners did not prevail until they reached the New York Court of Appeals, which, by a 4 to 2 vote, held that notice had been adequate. *Albright* v. *Town of Manlius,* 28 N.Y.2d 108, 268 N.E.2d 785, 320 N.Y.S.2d 50 (1971). Subsequent to this final decision, petitioners proceeded to construct their Fayetteville Mall.

None of the respondents appeared as parties in any of these actions, although they did provide the citizen plaintiffs with the organization, energy, experts, and financing necessary to frame and pursue their efforts to obtain judicial relief against the zoning changes petitioners had procured.

3. In the Second Circuit, petitioners argued that respondents' successful efforts to oppose the enactment of zoning ordinances were unlawful under the Sherman Act. That contention has been abandoned. It is clear under both *Noerr* and *Pennington* that respondents' efforts to influence zoning legislation did not violate the antitrust laws.

In 1975, ten years after the first Fayetteville Mall litigation commenced, petitioners obtained a zoning change for their proposed Great Northern Mall, an entirely separate project. Kimbrook Realty, one of the respondents, thereafter mounted, in its own right, a court challenge to this new amendment. It brought a so-called Article 78 proceeding, N.Y. Prac. Law §§7801-7806 (McKinney), which the court dismissed on technical grounds without reaching the merits. (*Kimbrook Realty* v. *Onondaga County Planning Board,* New York State Supreme Court decision filed on Feb. 7, 1977.) It also sought a declaratory judgment, but that action was voluntarily discontinued by Kimbrook after subsequent local zoning resolutions had rendered the suit moot. Thus, the merits were reached in neither Kimbrook action.

Petitioners allege, and for purposes of the decisions below it was taken as true, that the two Kimbrook litigations were brought at the direction of the Eagans, and were encouraged and financed by them and other respondents. It is not alleged that Kimbrook was not itself interested in the outcome of the litigation it commenced.

Petitioners also complain that respondents conspired to oppose, by political means, development by unidentified third parties of the Pyramid Mall East, a totally unrelated shopping center. No such allegations were contained in the dismissed complaint, but were mentioned the first time only in the rejected proposed amended complaint (see *infra* p. 7). In any case, petitioners had no interest whatsoever in the Pyramid Mall matter.

Proceedings Below

Petitioners brought this action in the United States District Court for the Northern District of New York. They alleged that respondents' involvement in the two sets of state court litigations challenging the zoning amendments, and their opposition to legislative enactment of the amendments, constituted an illegal conspiracy in violation of the Sherman Act, 15 U.S.C. §§1, 2.

The District Court (Hon. Edmund Port, Senior Judge) granted summary judgment[4] to respondents on the ground that their alleged activities were not prohibited by the Sherman Act, as this Court interpreted that Act in *Noerr-Pennington* and *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

Specifically, the District Court held that the *Noerr-Pennington* doctrine protected respondents' attempts to influence the action of any branch of the government.

> "This protection is afforded, even if such action is anti-competitive or monopolistic, . . ." (p. A-18).[5]

Accepting the truth of petitioners' allegation that respondents were motivated by an anticompetitive intent, the court concluded:

4. Respondents had moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(6); the District Court and the parties treated the motion as one for summary judgment because certain respondents submitted affidavits. For purposes of the motion, the allegations of the complaint were accepted as true by the courts below.

5. Throughout this brief, pages in the Appendix to the instant petition are referred to by the prefix "A"; pages in the petition itself are referred to by the prefix "Pet."

> "The First Amendment right of petition guarantees all citizens the right to appeal to the legislature or the judiciary. This right is not conditioned upon motive." (A-19).

Petitioners thereafter sought leave, pursuant to Fed. R. Civ. P. 59(e), to amend the judgment to permit them to replead. They attached to their motion a 129-page proposed amended complaint in an effort to cure the deficiencies of the original 57-page complaint.[6] Included in the proposed pleading were alleged transcripts of attorney/client telephone conversations concerning the underlying state court litigations. The trial court reviewed this elephantine proposed new pleading and concluded that the proposed amended complaint added nothing but length to the original complaint. Petitioners' motion was denied.

Petitioners' appeal to the Second Circuit was unavailing. That court unanimously affirmed summary judgment on the strength of Judge Port's opinion. On the subordinate issue of amendment, the Court of Appeals concluded that there was no abuse of discretion by the District Court in denying leave to file an amended complaint because the respondents' conduct, even under the facts and theory alleged in the new pleading, did not give rise to liability under the antitrust laws.

6. During oral argument on the motion to dismiss, petitioners' counsel conceded that there were no non-evidentiary facts which could be added to the pleadings, even were he given a chance to replead.

I

The entry of summary judgment does not merit further review because respondents' alleged activities fall squarely within the scope of the *Noerr-Pennington* doctrine.

The petition presents no issues worthy of review by this Court. It points to no conflict among the circuits concerning the *Noerr-Pennington* doctrine. It identifies no confusion among the lower courts as to the proper interpretation of that doctrine. It presents no facts, peculiar to this case, warranting a re-examination of that doctrine.

Lacking such grounds for review, petitioners attempt to characterize this as a case involving the scope of antitrust exemptions. They cite *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978) for the proposition that a heavy burden is placed upon those who would escape the strictures of antitrust by resorting to "immunity" (Pet. p. 15). But respondents do not claim, and the courts below did not impose, any "immunity." As this Court held in *Noerr*, Congress never intended, in adopting the antitrust laws, to abridge the right of petition. The Sherman Act simply does not prohibit competitors from combining to seek governmental relief, notwithstanding that such efforts may have adverse affects upon competition. This is true whether the relief so sought be legislative, administrative, or judicial. *California Motor Transport* v. *Trucking Unlimited*, 404 U.S. 508 (1972). If Congress did attempt to bar such petitioning, serious First Amendment problems would arise, but it has never been the intention of Congress so to cut off

access to itself, the courts or any other government agency. In short, this Court has already resolved petitioners' "immunity" contention.

Moreover, the doctrines advanced in *Noerr* and its progeny are clear and easy to apply. Petitioners assert without discussion that "the *Noerr* exemption remains in a state of confusion and disarray . . .," and make footnote reference to some 14 recent lower court cases in which *Noerr* is cited, apparently to prove the confusion they proclaim (Pet. pp. 24-25 n. 6). But petitioners nowhere identify the "confusion" which concerns them, and examination of the 14 cases cited demonstrates that, contrary to petitioners' characterization, the lower courts have well understood *Noerr* and have applied it consistently.[7]

Indeed, every court ever to consider the question has held that *Noerr-Pennington* and *California Motor Transport* protect litigation challenging shopping center rezoning. *Bob Layne Contractor, Inc.* v. *Bartel*, 504 F.2d 1293 (7th Cir. 1974); *Ernest W. Hahn, Inc.* v. *Codding*, 423 F. Supp. 913 (N.D. Cal. 1976); *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966 (E.D. Pa. 1975); *Bracken's Shopping Center, Inc.* v. *Ruwe*, 273 F. Supp. 606 (S.D. Ill. 1967). That is all that is involved here. This petition does not

7. Petitioners also cite *Otter Tail Power Co.* v. *U.S.*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd* 417 U.S. 901 (1974) as if it worked some radical revision of *Noerr*. It does not. As the District Court held, the facts of *Otter Tail* are readily distinguishable from the facts at hand; *Otter Tail* involved a scheme of repetitive litigation practiced as "part of a larger unlawful scheme characterized by *monopolistic* practices" (emphasis supplied) (p. A-29). Petitioners make no effort to challenge the District Court's careful analysis; they just ignore it.

present a novel issue, or a complex issue, or an issue with which the courts have had difficulty.

The courts below found that the complaint, for all its bulk, alleges no more than efforts to petition the government; they held that, according to *Noerr-Pennington,* such efforts were not illegal. Their readings of *Noerr-Pennington* are not only correct but also fundamentally consistent with the holdings of every other court which has so far faced analogous facts.

In claiming that respondents' litigation activity violates the antitrust laws, petitioners seek, in effect, to overrule *Noerr-Pennington.* But they offer no reason why that doctrine, based as it is upon sound statutory construction, if not constitutional compulsion, should abruptly be abandoned for their benefit.

Petitioners' contentions

Here, as below, petitioners cloak their effort to escape the consequences of *Noerr-Pennington* by invoking the narrow sham exception identified in *Noerr* and delineated in *California Motor Transport.* But the facts alleged cannot be reconciled with a "sham."

It was noted in *Noerr* that circumstances could arise where an illegal conspiracy amounted in reality to a simple and naked restraint upon competition, even though the formal indicia of petition were preserved. In such a case, the form of petition would be but a sham, and a sham does not immunize anticompetitive conduct.

This abstract possibility was concretely encountered in *California Motor Transport* v. *Trucking Unlimited* 404 U.S.

508 (1972), where it was held that a scheme by certain California truckers to oppose without basis virtually all of their competitors' routine applications for operating rights could constitute an illegal conspiracy. The conspirators pursued their reflexive opposition before the California Public Utilities Commission, the Interstate Commerce Commission and the courts with total indifference to probable cause and total disregard of the merits of their cases—to the point where those authorities were overwhelmed and could not effectively adjudicate the applications. This Court said:

> ". . . the allegations are not that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process." (*Id.* at 512).

As the District Court here observed, "access barring is the cornerstone to the sham exception." (p. A-26). But no respondent in this case ever barred petitioners' access to any tribunal; to the contrary, petitioners had full access to government as they required it. The District Court found that there was no access-barring here. Absent access-barring, efforts to influence the government do not give rise to antitrust liability even when those efforts are motivated by a desire to reduce or eliminate competition—and so the courts have always held.

It has also been suggested that when conspirators endeavor to corrupt the governmental process by means of perjury, bribery, misrepresentation or the like, their conduct may amount to access-barring. But the opinion below found:

> "In the instant case [petitioners] have not alleged any unethical or corrupt actions on the part of [respondents] in suing to declare the zoning amendments void. It is not alleged that perjury, bribery, misrepresentations, or any improprieties occurred during the litigation. Mere use of the state courts to challenge zoning amendments . . . cannot be characterized as an abuse of the judicial process. On the contrary, it is one of the facets of the First Amendment right of petition protected by *Noerr*." (pp. A-26-A-27)

Petitioners argue that respondents should nevertheless be denied the constitutional freedoms recognized by *Noerr-Pennington* because (1) none of the respondents was a party to any of the Fayetteville Mall litigations and not all of the respondents were parties to the Great Northern Mall proceedings, and (2) respondents involved themselves in these state court matters with the intention of restraining competition with petitioners. These alleged facts, even when taken as true, do not create a "sham" as that concept has been articulated by any court, including this.

It is of no relevance that not all respondents were parties plaintiff in the state court litigations they assisted.

Petitioners do not even attempt to argue that the underlying state litigations were sham in any intrinsic sense. Clearly the 32 local property owners who brought the first, successful, Fayetteville Mall proceeding and the 149 area residents who brought the later litigations believed themselves to have real and legitimate grievances for which they sought judicial redress.[8]

8. Petitioners suggest that the state court proceedings involve a pattern of repetitive, baseless litigations. In fact, the state court litigations were quantitatively modest and qualitatively strong. The

(footnote continued on next page)

Instead petitioners argue that it was an illegal "misrepresentation of standing" for respondents to organize and assist the Fayetteville state court litigants without themselves stepping forward as plaintiffs (Pet. p. 19).

As to the Great Northern Mall matter, petitioners appear to argue that the failure of the other respondents to join as co-plaintiffs somehow rendered illegal Kimbrook's effort to redress its own grievances.

Petitioners do not cite a single case in support of the proposition that it was illegal for respondents to assist the third parties in litigation, nor do petitioners suggest any misrepresentation of the standing of those persons who actually were plaintiffs in these proceedings.

A similar "third party" argument was raised and rejected in *Noerr* itself as "legally irrelevant" under the Sherman Act, 365 U.S. at 142. This Court found the *Noerr* defendants to have attempted to deceive public officials by making it appear that certain public statements were the spontaneously expressed views of independent persons and civic groups when, in fact, they were largely prepared, produced and paid for by the defendant railroads and their agents. The Court found that conduct to constitute a reprehensible deception, but nevertheless held it to be "of no

state court plaintiffs won the first litigation without appeal. They also won the first two rounds of the second proceeding; petitioners finally prevailed only upon a split Court of Appeals decision. The first Great Northern Mall proceeding was dismissed on procedural grounds and the second was withdrawn by plaintiffs as moot; neither ever reached the merits. As the District Court dryly observed, the facts at hand

> "are hardly the threads from which a 'pattern of baseless, repetitive claims' . . . can be woven" (p. A-28).

consequence so far as the Sherman Act is concerned." (*Id.* at 145.) Here, there is no claim of a comparable deception, since the state court plaintiffs concededly were real parties in interest, advancing actual objectives of their own. Still, even if there had been a deception, it, too, would "be of no consequence so far as the Sherman Act is concerned."

This Court has also held, repeatedly, that individuals have a constitutional right "to engage in association for the advancement of beliefs and ideas" through litigation. *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). In *NAACP* v. *Alabama*, the court held members of the NAACP had a constitutional right to associate for purposes which included supporting litigation by third parties, 357 U.S. at 452. Moreover, they had a constitutional right to do so *anonymously*: "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." 357 U.S. at 462. The First Amendment protects anonymous speech. *Talley* v. *California*, 362 U.S. 60, 64 (1960).

The Court reiterated the constitutional right to finance and assist litigation by third parties in *NAACP* v. *Button*, 371 U.S. 415 (1963) when it struck down a statute which had the effect of forbidding solicitation of lawsuits by the NAACP.

Although the NAACP cases involved litigation to advance political beliefs, the Court was careful to emphasize that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, ..." *NAACP* v. *Alabama*, *supra*, 357 U.S. at 460. *Accord*, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 231 & n. 28 (1977); *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1343 (7th Cir. 1977).

Petitioners refer in passing to *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912 (1978). That decision rejects the proposition that the First Amendment immunizes champerty, but in no way undercuts the basic doctrine of *Button* that one party may assist the litigation of another. Indeed, as stated in *Ohralik*,

> "the rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice." 98 S. Ct. at 1920.

Here respondents gave the local citizens assistance; they did not accept employment.

This Court has held in three separate decisions that third parties have a constitutional right to finance and assist in litigation to vindicate purely economic rights—the recovery of money damages for work-related injuries—because "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967). *Accord*, *United Transp. Union* v. *State Bar*, 401 U.S. 576 (1971); *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). Similarly, a statutory provision forbidding an employer organization from financing lawsuits by employees against their unions has been held unconstitutional because it violates the First Amendment rights of association and petition. *International Union UAW* v. *National*

Right to Work Legal Defense and Educ. Foundation, Inc., 433 F. Supp. 474, 481-482 (D. D.C. 1977).

In *Ernest W. Hahn, Inc.* v. *Codding*, 423 F. Supp. 913, 918 (N.D. Cal. 1976), one of the many cases holding that zoning litigation is within the scope of *Noerr-Pennington*, it was expressly held that:

> "... the allegation that defendants solicited others to bring lawsuits, standing alone or in conjunction with the charge that Codding brought sham lawsuits, [does not] create a claim cognizable under the antitrust laws."

Moreover, not one of the many other court decisions holding attempted or actual instigation of third-party litigation to be protected by *Noerr-Pennington* even mentions that such conduct might fall within the sham exception. *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1363 (10th Cir. 1972); *Rush-Hampton Indus.* v. *Home Ventilating Inst.*, 419 F. Supp. 19, 23 (M.D. Fla. 1976); *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966, 968 (E.D. Pa. 1975); *First Delaware Valley Citizens Television, Inc.* v. *CBS, Inc.*, 398 F. Supp. 917, 923 (E.D. Pa. 1975); *Brackens Shopping Center, Inc.* v *Ruwe*, 273 F. Supp. 606, 607 (S.D. Ill. 1967).

Petitioners suggest no reason for reviewing, much less departing from, these well-established, well-understood and evenly-applied principles.

The third party issue is not only irrelevant under *Noerr* and under the Constitution, it is also irrelevant as a matter of ordinary logic. What possible practical difference could it have made if respondents had also appeared as plaintiffs in the state court actions? Petitioners imply that they

could then have "expeditiously expose[ed] the frivolousness of the litigation to which [they had] been subjected" (Pet. p. 19). But exposure of respondents' "frivolousness" would not have affected the interests of the other, actual, plaintiffs, whose standing to pursue their state court actions has never been quesioned. Whether or not the respondents were named as plaintiffs, the litigations would have proceeded just as they did.[9]

The motives of respondents in assisting the state court litigants are irrelevant under *Noerr-Pennington*.

The second strand of petitioners' position, that respondents fall outside of *Noerr-Pennington* because they intended the anticompetitive consequences of the litigations they sponsored, likewise raises no cert-worthy issue. The contention is disposed of by *Noerr* itself.

In *Noerr*, this Court acknowledged that attempts to influence government conduct may be motivated by the desire to gain a competitive advantage. But the Court held that such motive is of no moment. The whole point of *Noerr* was that the "legality [of attempts to influence government conduct] was not at all affected by any anticompetitive purpose [defendants] may have had." 365 U.S. at 140.

9. Petitioners argue that respondents had no standing to sue in the state court actions. This contention raises an issue of state law not addressed by the courts below and not worthy of Supreme Court review. Clearly, on the basis of the present record, no informed judgment could be made that respondents, or any of them, could not have framed complaints sufficient to proceed in their own rights. And, again, had respondents joined as plaintiffs and then been dismissed for lack of standing, the state actions nevertheless would have proceeded just as they did.

In undertaking to assist the local property owners challenge to petitioners' zoning amendments, respondents obviously knew that one effect of such litigation could be a delay in construction of petitioners' shopping center, to respondents' competitive advantage. Neither this knowledge, nor the anticompetitive motive it suggests, raises unique *Noerr-Pennington* issues. The law is clear that anticompetitive motive is irrelevant.[10]

As this Court reiterated in *Pennington*, "Nothing could be clearer . . . than that anticompetitive purpose did not illegalize the conduct [in *Noerr*]." 381 U.S. at 669. As stated in *Noerr*, "To hold that the knowing infliction of [anticompetitive] injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns" (365 U.S. at 143-44). As stated in *Adolph Coors, Co.* v. *A&S Wholesalers, Inc.*, 561 F.2d 807, 812 (10th Cir. 1977), anyone making "a genuine attempt to secure a decision from the court on the merits" is protected by *Noerr-Pennington.*

10. Petitioners quote extensively from the alleged transcripts of attorney/client communications they have somehow obtained to establish the proposition that some respondents desired to delay construction of the new shopping centers. These documents are irrelevant to the summary judgment issue. The transcripts appear only as exhibits to the disallowed proposed amended complaint, filed after summary judgment was granted. A District Court may decide a summary judgment motion only on the facts and arguments on the record before it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970). However, the quotations contradict the very purpose for which they are selectively cited. Thus petitioners quote respondent Eagan as having told his attorney that "first of all, we hope we can stop them dead; if not, we can delay . . ." (p. 22). Whatever Eagan's motives as to delay, his objective "first of all" was to win a lawsuit and thereby "stop them dead." But there is no need to debate primary or secondary motive, for motive does not affect the application of *Noerr-Pennington.* Accordingly, as found by both courts below, these transcripts add nothing to petitioners' case.

If the easy allegation of impure motive were sufficient to remove litigations with anticompetitive implications from the ambit of *Noerr-Pennington*, there would be no practical protection for any such adjudicatory effort to redress a grievance, since some impure motive can always be alleged, and, realistically, can usually be demonstrated. But no court has ever held that purity of heart is a precondition for the *Noerr-Pennington* doctrine. Petitioners do not cite a single case holding that a serious attempt to obtain judicial resolution of a real dispute is rendered illegal by the presence of some anticompetitive motive. Any such holding would have issued in flat disregard of this Court's clear and simple doctrine: the Sherman Act does not apply to honest efforts to petition the government, whatever the motive for, and whatever the consequences of, such petitioning.

II

Denial of petitioners' post summary judgment motion to alter and amend the complaint does not merit further review since such denial was within the sound discretion of the trial court.

Petitioners "raise their objection" to the District Court's denial of leave to replead as one of their "questions presented" herein (p. 3). It is not clear whether they in fact assert this as an appropriate question for certiorari. Having "raised their objection," petitioners make no effort anywhere in their brief (1) to argue that the trial court abused its discretion or (2) to demonstrate that this matter is worthy of review on certiorari.

Petitioners sought no leave to amend their complaint until after summary judgment had been granted against them. They then sought relief under the stringent discretionary standards of a motion to alter judgment under Rule 59(e), *Swan* v. *Board of Higher Education,* 319 F.2d 56, 61 (2d Cir. 1963). Denial of a Rule 59(e) motion is reversible only where there has been an abuse of discretion, *Komie* v. *Buehler Corp.,* 449 F.2d 644, 647-48 (9th Cir. 1971).

Petitioners are apparently well aware that this Court does not regularly sit to review discretionary decisions of trial courts. The Second Circuit has already reviewed this issue and determined that the District Court did not abuse its discretion (p. A-2).

The District Judge noted that, on oral argument of the motion for summary judgment, petitioners conceded that the original complaint contained all material facts relating to their claim (p. A-31). The court found that, consistent with that concession, the proposed amended complaint added no relevant facts "not assumed to be in the original complaint." It concluded that granting the motion to alter judgment would "result in a futile, useless gesture." The Second Circuit expressly concurred in this judgment (p. A-2). Petitioners make no effort to demonstrate any abuse of discretion, and do not even brief the issue in their petition. There is no reason why certiorari should be granted on this point.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
November 2, 1978

Respectfully submitted,

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In The

Supreme Court of the United States

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC. AND JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL, *Petitioners,*

— *v.* —

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO & FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED AND DAVID C. MURRAY, *Respondents.*

KIMBROOK RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents Kimbrook Realty, Frank Fatti, William A. Bargabos, William J. Camperlino, Camperlino & Fatti Builders, Inc. and CFB Development Corp., referred to as the Kimbrook respondents, omit from this brief reference to opinions below, and the jurisdictional statement as permitted by U.S. Sup. Ct. Rule 40(3), 28 U.S.C.

QUESTIONS PRESENTED

1. Whether judicial and administrative opposition to zone changes, brought by and in the name of parties in interest, exposes to antitrust liability persons who instigate, support, and finance such opposition for anticompetitive purposes.

2. Whether instigating, supporting, and financing judicial opposition to zone changes by parties in interest, in their own name for anticompetitive purposes, exposes such parties in interest to antitrust liability.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Statutes and Constitutional provisions stated in the Petition for a Writ, the case involves §1025 of the New York Civil Practice Law and Rules:

> §1025 Partnerships and unincorporated associations.
>
> Two or more persons conducting a business as a partnership may sue or be sued in the partnership name, and actions may be brought by or against the president or treasurer of an unincorporated association on behalf of the association in accordance with the provisions of the general associations law.

STATEMENT OF THE CASE

Respondent Kimbrook Realty, Frank Fatti, William A. Bargabos, William J. Camperlino, Camperlino & Fatti Builders, Inc. and CFB Development Corp. (the Kimbrook respondents) deem it necessary to submit a restatement of the case due to certain omissions in the petitioners' statement of the case with respect to the conduct related to the Fayetteville Mall and the proposed Great Northern Mall.

1. Fayetteville Mall

In June of 1965, petitioners, through Suburban Heights Development Corp., petitioned the Town of Manlius for a zone change for Andrea Acres, the site where petitioners planned to construct a regional shopping center. In January, 1967 the Manlius Town Board amended its zoning ordinance to create a regional shopping district classification, and Andrea Acres, where petitioners' Fayetteville Mall now stands, was rezoned to that classification.

Certain Eagan respondents owned and operated Shoppingtown, a regional shopping center located approximately two miles from Andrea Acres. The two centers would compete for tenants and customers.

During the period petitioners were seeking the zone change, certain Eagan respondents, and others, allegedly "sought to and did obstruct the passage of the amendment" by instigating and organizing opposition by local merchants and homeowners, including retaining expert witnesses to appear on the homeowners' behalf at public hearings and financing legal proceedings on their behalf; creating "adverse publicity"; and attempting to influence Manlius Town officials by other than "authorized legal proceedings."

Petitioners claim that, after the rezoning of Andrea Acres, certain Eagan respondents and others, induced "neighboring residential property owners" to bring litigation challenging the amendment. Said respondents organized and financed this litigation for their own ends. Although successful at trial and in the Appellate Division, the challenge was ultimately dismissed by the Court of Appeals in a 4 to 2 decision.*

2. The Great Northern Mall

On February 23, 1976, acting on petitioners' application, the Clay Town Board changed the zoning of the site of the proposed Great Northern Mall from A-1 (agriculture, residential and other non-commercial use) to C-4 shopping district. Prior to that date, the town had rejected an application by respondent Kimbrook Realty for a 23 acre commercial site, being part of a large Planned Unit Development known as Kimbrook PUD, owned and operated by Kimbrook Realty, and located some two miles from the proposed Great Northern Mall.

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*_Albright_ v. _Town of Manlius_, 34 A.D.2d 419, 312 N.Y.S. 2d 13 (4th Dep't 1970); _Albright_ v. _Town of Manlius_, 28 N.Y. 2d 108, 320 N.Y.S. 2d 50 (1971).

Kimbrook Realty is a New York partnership made up of respondents Fatti, Bargabos, Camperlino and Kimbrook Corp. The corporate partner is alleged to be a New York corporation whose activities are directed by the Eagans or the Eagan Interests by reason of the ownership of a controlling interest in said corporation by one or more of the parties comprising said respondents. As stated in the District Court's memorandum decision (A.6, fn 4, Appendix to Petition), "[a] group of defendants bridges the Eagan and Kimbrook groups. Kimbrook Corp. is a partner in Kimbrook Realty which in turn operates the Kimbrook PUD. Defendants Paul D. Lonergan and Katherine M. Shea are officers of Kimbrook Corp. and also are employees of one of the Eagan interests. Through this chain, the Eagans allegedly control the Kimbrook defendants." (It is noted that respondent Kimbrook Corp. is not one of the Kimbrook respondents on whose behalf this brief is submitted.) Moreover, the individual respondents, Fatti, Bargabos and Camperlino are shareholders and/or officers of respondent CFB Development Corp., an operator and developer of the Kimbrook PUD; and respondents Fatti and Camperlino are shareholders and/or officers of respondent Camperlino & Fatti Builders, Inc.

On March 23, 1976, respondent Kimbrook Realty commenced a declaratory judgment action in Supreme Court, State of New York, entitled *Kimbrook Realty* v. *The Town of Clay, et al.*, seeking to have declared invalid and void the zone change for the Great Northern Mall. In addition, on June 16, 1976, respondent Kimbrook Realty commenced an Article 78 Proceeding under the New York Civil Practice Law and Rules seeking to reverse and annul the Referral Recommendation Notice of the Onondaga County Planning Board, and the Resolution of the Town Board of the Town of Clay by which the Great Northern Mall zoning amendment was enacted. This action was entitled *Kimbrook Realty* v. *Onondaga County Planning Board, The Town of Clay and Wilmorite, Inc. (Intervenor)*, and was dismissed by the State Supreme Court on December 27, 1976.

Both Kimbrook Realty proceedings were grounded on the same set of circumstances and at least one of the petitioners was a party to both proceedings.

The declaratory judgment action was terminated on July 26, 1977 by respondent Kimbrook Realty "by an order of discontinuance with prejudice on motion of Kimbrook. Kimbrook moved for such disposition after the town board had granted it relief on its application for a change of zone permitting a shopping center within its Planned Unit Development and after the town board had passed a further resolution in connection with the change of zone obtained by the plaintiffs. In Kimbrook's view, these actions of the Clay Town Board eliminated its objections to the change of zone granted Wilmorite." District Court Memorandum Decision, A.28, Appendix to Petition (footnote omitted).

Both Kimbrook lawsuits were allegedly financed and organized, in whole or in part, by the Kimbrook respondents, the Eagan respondents (or some of them) and others with the intent of resisting and defeating the Clay zoning amendment. Some of the Eagan respondents operate the Penn Can Mall which is alleged to be a competing regional shopping center to the Great Northern Mall.

The Complaint attributes specified conduct to specified respondents according to the following table (derived from paragraph 108 (v) of the complaint):

TABLE

Fayetteville Mall 1965-1971	Great Northern Mall 1976-June, 1977
The Eagans (3 individual parties)	The Eagans (3 individual parties)
The Eagan Interests (3 business parties)	The Eagan Interests (3 business parties)
Allied Stores	Allied Stores
Dey Brothers	Dey Brothers
Smith	--
Earl Oot	--
Reed	--
Murray	--
--	Pyramid Development
--	Pyramid Brokerage
--	Michael Falcone
--	Kimbrook Realty
--	Kimbrook Corp.
--	CFB Development Corp.
--	Camperlino & Fatti
--	Camperlino
--	Fatti
--	Bargabos
--	Lonergan
--	Shea
--	Murphy
--	Winmar
--	Deasy

THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I

THE SECOND CIRCUIT DECISION IS IN HARMONY WITH THE NOERR - PENNINGTON DOCTRINE.

One who is familiar with the facts wonders whether the questions presented to this Court, as framed by petitioners, relate to the instant case. Assuming *arguendo*, that the questions are answered in the negative, the questions framed would nevertheless appear to exclude a significant number of the respondents, including the Kimbrook respondents, from antitrust

liability, because the presumptions inherent in the framed questions have no application to such respondents. That is, the presumptions are at variance with the facts of the case. Thus, the questions presume a conspiracy and activity among horizontal business competitors. Yet, the named defendants include individuals who are not competitors:

1. David C. Murray (subsequently dropped as a defendant): a homeowner in the vicinity of the Fayetteville Mall site, who "was an organizer and the chairman of an organization . . . [which] opposed the development of the Fayetteville Mall."
2. Roger Smith: an expert witness on the development of regional shopping centers retained as such by some of the respondents with respect to the zoning of the Fayetteville Mall.
3. Arthur Reed: another expert witness retained as such by some of the respondents with respect to the Fayetteville Mall.

The complaint contains no allegations that any of the three individuals is in the real estate development business. Their inclusion as defendants would appear to stem solely from their administrative and judicial opposition to the petitioners' Fayetteville Mall.

The framed questions further presume the instigation of "multiple repetitive zoning lawsuits." Yet the allegations in the complaint are addressed solely to (1) two lawsuits commenced by different groups of local homeowners in March and July, 1967, in opposition to the zoning amendment of the Fayetteville Mall; and (2) two lawsuits commenced by respondent Kimbrook Realty in March and June, 1976, in opposition to the zoning amendment of the Great Northern Mall. It is submitted that the term "repetitive" does not reasonably encompass the occurrence of two incidences separated in time by nine years, within the meaning intended by this Court in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S.508 (1972).

Perhaps the most critical of the presumption not supported by the facts is that the zoning lawsuits were "in the names and interests of legitimate homeowners, without themselves [the respondents] petitioning and having no cognizable grievance to redress." At the outset it is noted that although the two 1967 lawsuits opposing the zone amendment of the Fayetteville Mall were brought by homeowners, the two 1976 lawsuits brought by respondent Kimbrook Realty opposing the Great Northern Mall zoning were *not* brought by homeowners, but rather by a business entity: a partnership. More significantly, however, the two 1976 lawsuits challenging the zoning amendments for the Great Northern Mall in the Town of Clay were brought by respondent Kimbrook Realty, in its own name, to redress a grievance.

Kimbrook Realty owns and operates the Kimbrook PUD, located some distance from the Great Northern Mall. There are no allegations in the complaint that its standing to maintain the proceeding was ever challenged by Wilmorite, Inc., a party in both proceedings.

New York Civil Practice Law and Rules, §1025, authorize "[t]wo or more persons conducting business as a partnership [to] sue or be sued in the partnership name . . . ." However, §1025 "is permissive in nature and does not mandate such a course." *Arlen of Nanuet, Inc.* v. *State*, 52 Misc.2d 1009, , 277 N.Y.S.2d 560, 563 (1967). Although for purposes of pleading under the New York Civil Practice Law and Rules a partnership may be considered a separate legal entity, "it is not from the standpoint of substantive law an entity separate and apart from the members of the [partnership]." 20 Carmody-Wait 2d §122:5. Thus, the statement that the respondents instigated lawsuits "without themselves petitioning and having no cognizable grievance to redress," is incorrect as a matter of New York substantive law. The Kimbrook Realty proceedings were in substance brought by the individual partners since the cause of action of the partnership is the cause of action of the individual partners. Hence, the allegations that respondents Fatti,

Bargabos, Camperlino, Kimbrook Corp. and others having an interest in the Kimbrook PUD, financed, prosecuted and supported the Kimbrook Realty proceedings, merely overstates their obvious constitutional right to do so.

It is interesting to note that the petitioners' arguments to this Court are devoid of time and space frames. The petitioners attempt to impart to their statements a unity of time and applicability which does not exist under the facts of the case. Without so stating, they confine their arguments to events which occurred between 1965 and 1971 with regard to the Fayetteville Mall zoning. They have very little to say with regard to the Kimbrook Realty lawsuits which challenged the validity of the Great Northern Mall zoning, and which involve the larged number of respondents.* So little, in fact, that the petitioners devoted a six-line paragraph to a discussion of the activities related to the Great Northern Mall (Petition, p. 20.)

The respondents term "repetitive" the two Kimbrook proceedings which they allege are based on the same circumstances and which were brought three months apart under separate provisions of New York law. More significantly, however, the petitioners argue that "[k]ey to the scheme . . . was again concealing the true party in interest from the courts." (Petition, p. 20.) The petitioners' statement is simply not reconcilable with the facts: Kimbrook Realty and its four partners and owners of the Kimbrook PUD, all respondents herein, *were* the parties in interest. As such, even under the narrow legal theories of liability propounded by the petitioners, the conduct attributable to respondents Kimbrook Realty and its four partners falls

*See TABLE of respondents, *supra*, at p. 6. Of the 27 named defendants 8 are alleged to have engaged in activities involving both the Fayetteville Mall and the Great Northern Mall, an additional 4 are alleged to have engaged in activities involving solely the Fayetteville Mall, and an additional 15 are alleged to have engaged in activities involving solely the Great Northern Mall.

under the protective mantle of *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as made applicable to the administrative and judicial branches of government by *California Motor Transport, supra.* As *Noerr* made clear, if the conduct is protected, then the purpose and intent behind such conduct, and its effect on a competitor, are legally irrelevant. It follows that if conduct amounting to petitioning the courts to redress a grievance is protected, and it is such conduct that causes the alleged anticompetitive injury, the support of such conduct by others does not change its character; it is still protected and the malevolent purpose or intent of such others is not legally relevant.

The decision of the Court of Appeals is therefore in harmony with the *Noerr-Pennington* Doctrine and the cause should not be reviewed by this Court.

II

THE LOWER COURTS WHICH HAVE HAD AN OPPORTUNITY TO APPLY THE NOERR-PENNINGTON DOCTRINE ARE IN HARMONY WITH ITS TEACHINGS.

The petitioners cite numerous lower court cases for the unsupported proposition that "the *Noerr* exception remains in a state of confusion and disarray . . . ." (Petition, pp. 24-25.) Yet, the petitioners make no attempt to point out to the Court where the lower courts have gone astray in applying the *Noerr-Pennington* Doctrine. The reasons become apparent upon analysis of the appropriate decisions: the lower courts are remarkably uniform in their application of the doctrine. The cause should therefore not be reviewed by this Court.

CONCLUSION

For the reasons set out above, the cause should not be reviewed by this Court, and the petition should be denied.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ALLIED STORES CORPORATION AND DEY BROTHERS & CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners raise no issue worthy of review by this Court. The decisions of the courts below are fully consistent with nearly two decades of judicial precedent holding that joint efforts to influence public officials are exempt from antitrust prosecution. *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). There is no merit to petitioners' suggestion that this Court should overrule or emasculate the *Noerr-Pennington* doctrine.

Petitioners' argument that respondents were not engaged in constitutionally protected activity because they were not the actual complainants before the local zoning boards or the state courts simply ignores the prior decisions of this Court that use of the "third-party technique" does not constitute a violation of the Sherman Act and is "legally irrelevant". *Eastern Railroads Presidents' Conference* v. *Noerr Motor Freight, Inc., supra* at 129-33, 140-42.

Petitioners' subsidiary claim that they were barred "access to usable zoning relief" misconstrues this Court's decisions in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), which concerned a pattern of baseless, repetitive litigation that effectively barred one party from access to the courts. Nowhere in either of their complaints did petitioners allege they were barred such access; on the contrary, their complaint is simply that the litigation took too long before they finally prevailed by a divided decision in the New York Court of Appeals.

Petitioners' claim that the publicity campaign allegedly conducted by respondents was a "sham" because it may have caused some measure of economic injury to them is likewise disposed of by *Noerr*. This Court recognized that an "incidental effect" of an attempt to influence public officials may be the "infliction of some direct injury upon the interests of the party against whom the campaign is directed", but found that risk less compelling than the free exercise of First Amendment rights. 365 U.S. at 143.

Finally, the petition raises no constitutional issue that has not been dispositively determined by this Court in the previously-cited cases. In 1977, this Court declined to review two decisions by Courts of

Appeals which involved virtually the same allegations as were made here, *e.g., Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Central Bank of Clayton* v. *Clayton Bank*, 424 F. Supp. 163 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977), and the petition points to no subsequent conflict among the Circuits requiring a different determination. On the contrary, the courts have been remarkably consistent in their application of this Court's prior decisions.

Conclusion

This petition, raising no issues to which this Court has not already definitively addressed itself and to which those decisions were not correctly applied, should be denied.

Respectfully submitted,

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